Supreme Court, U.S.
FILED

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No. ——

IN THE

Supreme Court of the United States

BNL EQUITY CORPORATION (formerly known as UNITED ARKANSAS CORPORATION), BNL FINANCIAL CORPORATION (formerly known as UNITED IOWA CORPORATION), WAYNE E. AHART, KENNETH TOBEY, and BARRY N. SHAMAS,
Petitioners,

v.

MYRA JO PEARSON, PAUL PEARSON and JAMES STILWELL,
Respondents.

On Petition for a Writ of Certiorari to the Arkansas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This is a case involving the Arkansas Supreme Court's treatment of the certification of a class action. In a prior decision, the Arkansas Supreme Court expressly declined to conduct a "rigorous analysis" of the material facts and questions of law during class certification proceedings as required in *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982), even though the Arkansas Supreme Court has explicitly stated that it will construe Arkansas Rule of Civil Procedure 23 in uniformity with Federal Rule of Civil Procedure 23. The Arkansas Supreme Court's refusal to conduct a "rigorous analysis" is based on *Eisen v. Carlisle & Jaquelin*, 417 U.S. 156 (1974), which prevents "delving into the merits." Thus, the following questions arise:

1. When considering the certification of a class action, whether the failure to apply *Falcon*'s "rigorous analysis" violates a defendant's rights of due process under the Fourteenth Amendment to the United States Constitution.

2. When considering the certification of a class action, whether *Falcon*'s "rigorous analysis" can be prohibited based on *Eisen*'s prohibition of "delving into the merits" without violating the defendant's due process rights under the Fourteenth Amendment to the United States Constitution.

3. When considering the certification of a class action, whether *Eisen*'s prohibition against "delving into the merits" and *Falcon*'s requirement of a "rigorous analysis" can be applied in harmony in the same case without violating the defendant's due process rights under the Fourteenth Amendment to the United States Constitution.

LIST OF PARTIES

Petitioners in this Court are:

BNL Equity Corporation ("BNL Equity") is an Arkansas corporation with offices located in Little Rock, Arkansas and Austin, Texas. BNL Equity was formerly known as United Arkansas Corporation ("UAC"). BNL Equity is one hundred percent owned by BNL Financial Corporation.

BNL Financial Corporation ("BNL Financial") is an Iowa corporation with its principal place of business located in Austin, Texas and with offices in Little Rock, Arkansas, and Des Moines, Iowa. BNL Financial was formerly known as United Iowa Corporation ("UIC").

Wayne E. Ahart, Austin, Texas, Chief Executive Officer, Chairman of the Board of Directors and a member of the Board of Directors of BNL Equity and BNL Financial.

Kenneth Tobey, Little Rock, Arkansas, President and a member of the Board of Directors of BNL Equity and BNL Financial.

Barry N. Shamas, Austin, Texas, Executive Vice President, Treasurer and a member of the Board of Directors of BNL Equity and BNL Financial.

Respondents in this Court are Myra Jo Pearson and Paul Pearson, Monticello, Arkansas, and James Stillwell, Benton, Arkansas.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioner BNL Financial is the parent holding company of BNL Equity and owns one hundred percent of BNL Equity's outstanding capital stock. In turn, BNL Equity is a holding company which owns one hundred percent of Brokers National Life Assurance Company ("BNLAC"), an Arkansas domesticated life insurance company with its principal place of business located in Little Rock, Arkansas. BNLAC is authorized to transact insurance business in twenty-six states pursuant to its certificate of authority to sell all forms of life, disability and health insurance.

BNL Financial is a publicly held company reporting to the United States Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934. To the knowledge of BNL Financial, there is no publicly held company which owns ten percent or more of BNL Financial's stock.

The Board of Directors of BNL Financial and of BNLAC, as of the original complaint, consisted of:

Wayne E. Ahart
Chairman of the Board

Cecil Alexander
Vice President, Arkansas Power and Light

Richard Barclay
Director, Arkansas Department of Finance and Administration

C. Donald Byrd
Vice Chairman of the Board

Eugene A. Cernan
Chairman, The Cernan Corporation
Former United States Astronaut

Hayden Fry
Coach, University of Iowa

John Greig
President, Greig and Company

Roy Keppy
Pork Producer

Thomas Landry
Former coach, Dallas Cowboys
Deceased on February 12, 2000

Roy Ledbetter
President, Highland Industrial Park

John E. Miller
Insurance, Real Estate and Farming, Former Speaker of the House, House of Representatives, Arkansas General Assembly

James A. Mullins
Owner, Prairie Flat Farms

C. James McCormick
Chairman, McCormick, Inc.

Robert R. Rigler
Chairman, Securities State Bank

Chris Schenkel
ABC Sports Commentator

L. Stanley Scholerman
President, Peterson Sheep & Cattle Company

Barry N. Shamas
Executive Vice President and Treasurer

Orville Sweet
President, Sweet & Associates

Charles Thone
Partner, Erikson & Sederstrom, Attorneys
Former United States Congressman and Governor of Nebraska

Kenneth Tobey
President

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Petitioners, BNL Equity Corporation (formerly known as United Arkansas Corporation), BNL Financial Corporation (formerly known as United Iowa Corporation), Wayne E. Ahart, Kenneth Tobey, and Barry N. Shamas (collectively "BNL"), respectfully petition for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (App., *infra*, 1a-18a) is reported at 10 S.W.3d 838. The denial of the petition for rehearing by the Arkansas Supreme Court (App., *infra*, 48a) is unreported. The order of the Pulaski County,

Arkansas, Circuit Court (App., *infra*, 19a-42a) granting class certification is unreported.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on February 10, 2000. The Arkansas Supreme Court denied a timely petition for rehearing on March 16, 2000. This petition is filed within ninety (90) days of March 16, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section One of the Fourteenth Amendment to the Constitution of the United States provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law . . . . " U.S. Const. amend. XIV, § 1.

STATEMENT

A. Facts and Proceedings Below

The essence of this case is whether the trial court and Arkansas Supreme Court's refusal to conduct the rigorous analysis compelled in the class certification process by *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982), and which was based on the proscription against delving into the merits as held in *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974), was in violation of Fourteenth Amendment Due Process.

Respondents sued petitioners, BNL Equity Corporation, BNL Financial Corporation, Wayne E. Ahart, Kenneth Tobey, and Barry N. Shamas, on April 30, 1996, in the Circuit Court of Pulaski County, Arkansas. In their third amended class action complaint, the respondents asserted only a single cause of action contending that they were entitled to relief under the Arkansas Securities Act, Ark. Code Ann. § 23-42-

106 ("Section 106"). (App., *infra* 63a - 65a). Their Section 106 claim is based on alleged written and oral misrepresentations and omissions of material fact made in connection with two separate public offerings of stock by United Arkansas Corporation ("UAC"). UAC was incorporated in Arkansas on November 10, 1998, as a holding company to organize a life insurance company which it did on September 21, 1990, when United Arkansas Life Assurance Company ("UALAC") was incorporated as a wholly owned subsidiary of UAC.[1] UALAC was issued a Certificate of Authority by the Arkansas Insurance Commissioner on December 21, 1990, to engage in the business of life and disability insurance which encompasses all forms of health insurance including dental insurance.

UAC's first offering commenced on May 1, 1989, and was completed on May 1, 1991, (the "First Offering") and its second public offering commenced on May 1, 1991, and ended on May 1, 1992 (the "Second Offering"). The original Plaintiffs were Myra Jo Pearson and Paul Pearson (the "Pearsons"). James Stilwell ("Stilwell") was added by the third amended complaint. The Pearsons purchased securities in the First Offering and the Second Offering. Stilwell purchased securities in only the First Offering.

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[1] In 1994, UAC and UALAC went through a substantial business reorganization ("1994 Merger") with the resulting insurance holding company being BNL Financial Corporation, an Iowa corporation ("BNL Financial"). The resulting insurance company was redomesticated to Arkansas as Brokers National Life Assurance Company ("BNLAC"). BNLAC is a wholly owned subsidiary of BNL Equity Corporation, an Arkansas corporation ("BNL Equity"). BNL Equity is a wholly-owned subsidiary of BNL Financial. Petitioner Wayne Ahart was the Chairman of the Board of UAC and UALAC; petitioner Kenneth Tobey was the President and a director of UAC and UALAC and petitioner Barry Shamas was Executive Vice President and a director of UAC and UALAC. Messrs. Ahart, Tobey and Shamas currently hold those same positions with BNL Financial and BNLAC.

Respondents generally alleged that misrepresentations or omissions of material fact were made in the public offering circulars and scripted sales presentations. BNL denied the allegations of the third amended complaint and asserted affirmative defenses including release, assumption of the risk, laches, waiver, estoppel, failure to mitigate damages and the statute of limitations. Based on their laches defense, BNL sought transfer of the action to the chancery court which was denied by the trial court.[2]

The respondents, under Arkansas Rule of Civil Procedure 23 ("Arkansas Rule 23"), moved to certify a class consisting of all investors solicited to purchase securities of UAC in the First Offering and Second Offering and who, in fact, did purchase such securities. (R. 489-514). BNL opposed class certification on the grounds that a rigorous analysis of the legal and factual issues would demonstrate that Arkansas Rule 23 commonality, typicality, superiority and predominance requirements could not be satisfied. BNL also contended that trial on the core liability issue under Section 106, part of which requires that the UAC security buyers[3] prove they did not have knowledge of the facts which are the basis for their claim, and the defenses to the core liability issue could not be accomplished on a class-representative basis.

On June 8, 1998, the trial court held a hearing on Plaintiffs' Motion for Class Certification. On August 27, 1998, the trial court entered the Plaintiffs' Proposed Order Granting Class Certification.[4] The trial court did not rigorously analyze the

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[2] Law and equity remain divided in Arkansas.

[3] The "buyers" are the Pearsons, Stilwell and each putative class member. Each buyer must prove, as an element of their cause of action, that they did not know of the untruth or omission. In addition, BNL contends that laches, waiver, estoppel and failure to mitigate are defenses to the potential liability to each putative class member.

[4] This is the final class certification order. (App., *infra*, 19a- 42a). This order was proposed by the respondents and the trial court entered it

factual and legal issues, but rather summarily dismissed all of the evidence and arguments presented by BNL as an improper intrusion into the merits. In doing so, the trial court relied heavily on *Mega Life & Health Ins. Co. v. Jacola*, 954 S.W.2d 898 (Ark. 1997), wherein the Arkansas Supreme Court expressly *rejected* the need for such a rigorous analysis. Although the trial court recognized the Arkansas Supreme Court's decision to uniformly interpret Arkansas Rule 23 with Rule 23 of the Federal Rules of Civil Procedure ("Federal Rule 23") (App., *infra*, 57a-60a),[5] it did not recognize federal decisions contrary to the plaintiffs' position.

Under Arkansas Rule of Appellate Procedure—Civil 2(a)(9), BNL had the right to an immediate appeal of the order granting class certification before the remainder of the case was concluded. (App., *infra*, 61a). BNL made its appeal. The Arkansas Supreme Court affirmed the class certification. Most notably absent from the Arkansas Supreme Court opinion was any discussion of a "rigorous analysis" as set out in *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982). Instead, the court characterized BNL's arguments as going to the merits and, thus, summarily disregarded them.

Only Justice Thornton, the lone dissenter, recognized the need to follow the rigorous analysis process as found under the corresponding federal jurisprudence. His evaluation impliedly recognized that BNL was not trying to delve into the merits of the case. Justice Thornton alluded to his prior dissents in this line of class certification cases, where he had urged the Arkansas Supreme Court to follow the United

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without change except modifying the word "Decree" to the word "Order."

[5] The Arkansas Supreme Court has held that it will follow federal law in interpreting Arkansas Rule 23. *See Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Farm Bureau Policy Holders and Members*, 918 S.W.2d 129 (Ark. 1996); *Union Nat'l Bank v. Barnhart*, 823 S.W.2d 878 (Ark. 1992).

States Supreme Court's reasoning and procedure in *Falcon* and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). *See Mega Life*, 954 S.W.2d at 905-06 (Thornton, J., dissenting); and *SEECO, Inc. v. Hales*, 954 S.W.2d 234, 241 (Ark. 1997) (Thornton, J., dissenting).

BNL's Petition for Rehearing to the Arkansas Supreme Court was denied. (App., *infra*, 48a). Pursuant to Arkansas Rule of Supreme Court 5-3(c), (App., *infra*, 62a), BNL moved for a stay of mandate while pursuing this Petition for Writ of Certiorari. (App., *infra*, 49a-52a). On March 23, 2000, the Arkansas Supreme Court entered an Order granting BNL's motion for stay of mandate. (App., *infra*, 53a).

B. Federal Questions Raised and Passed On

The substantial federal questions involving due process in this case have been properly preserved for appeal at both the trial court level and before the Arkansas Supreme Court. The due process argument was first raised before the Pulaski County Circuit Court, Third Division, in Defendants' Preliminary Response in Opposition to Plaintiffs' Motion for Class Certification. (R. 557, 603). BNL next raised its due process argument in Defendants' Proposed Findings of Fact and Conclusions of Law That Class Certification Should be Denied. (R. 2986-87). The trial court rejected BNL's argument and granted class certification. BNL also raised its due process argument in Defendants' Motion for Amended Findings of Fact and Conclusions of Law. (R. 3134)

BNL's due process argument was raised before the Arkansas Supreme Court in the Abstract and Brief of Appellants. *See* Abstract and Brief of Appellants, p. 270. BNL similarly alluded to the proper analysis established by this Court in the Reply Brief of Appellants. *See* Reply Brief of Appellants, pp. 3-4, 11-13. The Arkansas Supreme Court rejected BNL's argument and affirmed class certification. In addition, BNL's Petition for Rehearing and Supporting Brief raised these points. *See* Petition for Rehearing and Supporting Brief, *pas-*

sim. Finally, the Arkansas Supreme Court granted BNL's Motion for Stay of Mandate and Memorandum of Authorities. This motion (App., *infra*, 49a-52a) and accompanying order (App., *infra*, 53a) certify that BNL's due process argument was properly raised and passed on by the Arkansas Supreme Court. This order was made pursuant to Arkansas Supreme Court Rule 5-3(c), which is the only certification made available by the Arkansas Supreme Court when review is sought before the United States Supreme Court. (App., *infra*, 62a).

C. Jurisdiction

This Court has jurisdiction to review the Arkansas Supreme Court's decision pursuant to 28 U.S.C. § 1257(a). BNL seeks review of an order granting class certification under Arkansas Rule 23. Review by this Court is proper and within the finality doctrine. The federal issue here is BNL's right to due process under the Fourteenth Amendment in relation to the grant of class certification. The tenor of *Cox Broad. Corp. v. Cohn*, 420 U.S. 468 (1975) (pragmatic approach In fouur categories) and *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) (collateral order doctrinee) is to permit the review of federal questions which are, for all practical purposes, concluded even though additional events need to occur at the lower court level, including even a trial on the merits. Recently, class certification issues have continued to be important for this Court to review. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). There is a solid history in this Court that class action issues are important to review. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

This state case falls within categories one, three and four [6] of the pragmatic categories expressed in *Cox Broad. Corp.*

[6] This state case may also qualify for review under category two.

v.Cohn, 420 U.S. 469 (1975). It is in these four categories where:

> Additional proceedings would not require the decision of other federal questions that might also require review by the court at a later date, and immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice as well as precipitate interference with state litigation.

Id. at 477-78 (internal quotations and citations omitted).

The four categories are those cases:

> (1) in which there are further proceedings–even entire trials–yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final . . . ; (2) in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of further state court proceedings . . .; (3) where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case . . .; and (4) where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 479-83.

The federal question—Fourteenth Amendment Due Process—in this case has been concluded. BNL appealed the trial

court's class certification order as a matter of right under Arkansas procedure, Ark. R. App. P.-Civil 2(a)(9), and the Arkansas Supreme Court affirmed. The federal issue was part of the trial court and Arkansas Supreme Court proceedings and is now finished. The further state court proceedings, trial on the merits of a state securities law claim, will not alter the federal issue.

This case also fits in the third category because the Arkansas Supreme Court class certification procedure will remain in place regardless of the outcome on the merits. If the defendants prevail on the merits, the federal question will be mooted. Conversely, if the plaintiffs win on the merits, the defendants cannot appeal this federal issue again. *See Cox*, 420 U.S. at 481.[7]

The instant case is also within the fourth category. Assuming *arguendo* that Arkansas' class certification procedure is unconstitutional and BNL prevails on the merits under Arkansas statutory law, the unconstitutional class action procedure would remain in effect for all future class action litigants in the state. Similarly, if this Court reverses the unconstitutional class action procedure and reverses the class action order, this case is terminated as a class action. If this Court refuses immediate review, the Arkansas approach, which substantially erodes all Arkansas class action defendants of their federally protected right to Fourteenth Amendment Due Process, will remain in place. This perilous situation is sufficient justification for immediate review of the federal question by this Court.

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[7] BNL is cognizant of the Court's decision in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), which noted that the Court's jurisdiction is not limited by the "law of the case" doctrine. However, BNL contends that such a future appeal after a decision on the merits may be waived if not currently asserted here.

Moreover, this Court has reviewed class certification procedures as part of the collateral order doctrine.[8] For example, this Court has heard class certification cases where a trial court ordered a defendant to bear the expense of identifying class members. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). Both the granting and denial of class certification is appealable as collateral to the merits. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) and *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980).[9] In *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), this court had jurisdiction to review a Federal Rule 23 class certification where a district court required a defendant to bear the cost of notice to class members during the certification process. In that case, this court noted that the case was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *Id.* at 172. It was a final decision collateral to the merits.

This Court has adopted a "practical rather than a technical construction" of the finality requirement, *Cohen v. Beneficial*

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[8] Although the collateral order doctrine is primarily used in federal court, it has been applied for writ of certiorari jurisdiction to the state courts. *See National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977).

[9] BNL notes that *Ortiz* and *Roper* were reviewed through an interlocutory certified question and are distinct from *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), but BNL contends it should not be prejudiced because there is not such a similar certified question process from the state courts of last resort. Indeed, this Court has never held that a state court litigant should be so limited. Under Arkansas procedure, BNL had a right to appeal the trial court's class certification order before the remainder of the case was concluded. Ark. R. App. P.–Civil 2(a)9. (App., *infra*, 61a). BNL submits that state cases of this kind are within the breadth of § 1257(a). Moreover, the trend to accept jurisdiction is illustrated by the 1998 amendment of subdivision (f) of Federal Rule 23, which allows the circuit courts of appeal to review grants and denials of class certification without requiring a certified question.

Indus. Loan Corp., 337 U.S. 541 (1949), and has further noted that "the principles of finality have not been construed rigidly." *Pennsylvania v. Ritchie*, 480 U.S. 39, 47 (1987). The present case falls well within the letter and the spirit of the finality doctrine and, therefore, this Court has jurisdiction to hear this case.

REASONS FOR GRANTING THE PETITION

I. THE ARKANSAS APPROACH VIOLATES DUE PROCESS

Review of this case should be granted because the Arkansas Supreme Court's improvident approach to class certification significantly deviates from the right of due process under the Fourteenth Amendment and implicates defendants in all class action cases. Immediate review is necessary to rectify this constitutional quagmire.

The Arkansas departure from the constitutional requirements was clearly enunciated in *Mega Life & Health Ins. Co. v. Jacola*, 954 S.W.2d 898 (Ark. 1997). In *Mega Life*, the majority opinion held that a "rigorous analysis" of factual and legal issues was not required in Arkansas Rule 23 class certification cases. *Id.* at 901. In rejecting the "rigorous analysis" approach, the Arkansas Supreme Court stated:

> We are unable to find any Arkansas case requiring the trial court to conduct a rigorous analysis, or for that matter, any case that describes exactly what such an analysis entails . . . . We have not . . . previously required the [trial] court to enter into the record a detailed explanation of why it concluded that certification was proper, and we refuse to impose such a requirement upon the trial court at this time.

Id. The departure was compounded when the trial court in the present case emphasized that it would follow *Mega Life* as the "outline" for class certification because it "has everything you need to know about class certification." (R. 3248) (App.,

infra, 43a-47a).[10] Yet, *Falcon's* "rigorous analysis" requirement that has been a well recognized cornerstone of rule 23 class certification cases for a long time was not even mentioned by either the trial court or the Arkansas Supreme Court in this case. Neither court actually conducted the necessary probe mandated by constitutional law.

The Arkansas Supreme Court rejected BNL's arguments as an attempt to violate the court's prohibition of delving into the merits. The court based its conclusion on a line of its own cases, notably *Farm Bureau Mutual Ins. Co. of Ark., Inc. v. Farm Bureau Policy Holders and Members*, 918 S.W.2d 129 (1996). In *Farm Bureau*, the Arkansas Supreme Court relied directly on *Eisen* as the foundation for prohibiting inquiry into the merits when considering class certification. In *Mega Life*, where the Arkansas Supreme Court rejected the doctrine of "rigorous analysis," the court cited *Farm Bureau* for the proposition that trial courts and appellate courts may not delve into the merits.

According to the Arkansas Supreme Court, the *Eisen* interdiction trumps *Falcon*'s rigorous analysis. This creates a dark and deep unconstitutional trap for all class action defendants. Only a review by this Court can diffuse the trap.

Ultimately, the objective of a rigorous analysis is to test whether a case can be fairly tried as a class action without trampling on the due process rights of defendants. Having a fair trial includes a fair opportunity to prepare for trial. The Arkansas Supreme Court's approach totally squelches all opportunity for a fair trial and instead constructs the footing for trial by ambush. A rigorous analysis of the factual and legal issues would have shown that the Pearsons' claim and Stilwell's claim, and the separate defenses thereto, are so

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[10] In a letter to counsel dated June 23, 1998, the trial court also explicitly directed the litigants to address each requirement set out in *Mega Life* in their proposed order of findings and conclusions. (R. 2928).

individualized that class action treatment cannot be applied without violating BNL's rights of Fourteenth Amendment Due Process. Illustrations of such issues follow.

The Pearsons contended that they thought BNL would be selling primarily life insurance and they were unaware that BNL would be selling dental insurance. Yet, on January 28, 1992, the Pearsons attended an information meeting at the Monticello Country Club, Monticello, Arkansas ("Monticello Meeting"),[11] where management's intention to pursue the sale of dental insurance was extensively presented. A video tape ("Monticello Video") was made of the Monticello Meeting and the Pearsons are recorded as sitting on the first row.[12] The Pearsons contended they thought BNL would use only "captive agents" and they were unaware that BNL's management would use non-captive insurance agents and brokers to market insurance products. Yet, at the Monticello Meeting the Pearsons were told that BNL's management would use all types of insurance agents and brokers to market insurance products. The prospectuses never use the phrase "captive agent" and the prospectuses never place a limit on the types of insurance products BNL may offer pursuant to its certificates of authority. This knowledge is relevant to defeat the Pearson's claim under Section 106. The Pearsons' response is that they formed an "impression" as a result of attending the Monticello Meeting. Will this knowledge and "impression" be imputed to those putative class members who did not attend the Monticello Meeting or another information meeting?

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[11] BNL conducted about thirty (30) such information meetings throughout Arkansas during the public offerings. Some shareholders and prospective investors—putative class members—attended, some did not attend. During the public offerings, no putative class members complained about possible misrepresentations or omissions of material fact.

[12] A transcript of the Monticello Video is part of the record. (R. 2479-2518).

In support of class certification, the Pearsons and Stilwell submitted affidavits showing that they each made their own personal impressions and they made arguments showing they made their own personal interpretations (collectively "Personal Interpretations") of the prospectuses and sales presentation. Respondents applied their Personal Interpretations to their meanings of "success" and the "life insurance business," their judgments of management's qualifications, prerogatives and leadership, and their opinion of what constitutes a corporate opportunity and therefore, their Personal Interpretations became the alleged foundations for their lawsuit. How can individual Personal Interpretations be the basis for predominant common issues among all putative class members?

The claim of a putative class member cannot be based on non-existent facts. For example, the facts relating to dental insurance, insurance agents and brokers did not exist when Stilwell and many other putative class members purchased UAC securities.

The absence of claims or objections is relevant to class consideration. For years BNL circulated reports to shareholders and made public filings with the multiple state insurance departments but the Pearsons, Stilwell, and other putative class members did not complain or object in any way about dental insurance, independent agents, brokers or any other matter of management's conduct of the business and affairs of BNL.

None of these Personal Interpretations, issues of fact (perhaps more precisely the non-existence of facts) or legal issues were critically analyzed as required under *Falcon*. Had the proper rigorous analysis been implemented, both the trial court and the Arkansas Supreme Court would have recognized that the class definition proffered by the respondents and certified by the trial court required an analysis of the state of mind and the Personal Interpretations of each putative

class member in order to include or exclude the class member from the class definition. The Personal Interpretations of the respondents combined with the state of their knowledge at the time they purchased UAC securities, obviously differs from those of other putative class members. A properly recognized and applied rigorous analysis would have demonstrated that these differences are so significant that the predominance requirement fails. This error was both harmful and prejudicial to BNL.

At the heart of procedural due process is the fundamental proposition that a party is afforded notice and an opportunity to be heard before the state deprives it of life, liberty, or property. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Similarly, substantive due process, at a minimum, requires the state deprivation to be rational and not arbitrary. *Wolff v. McDonnell*, 418 U.S. 539 (1974). This Court has addressed due process requirements in class actions on prior occasions. For Example, the Court has held that absent class members are entitled to notice as part of due process. *Eisen v, Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Indeed, due process requires persons who are forced to settle their claims through judicial process to be given a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). More importantly, a defendant has due process protection for an opportunity to be heard that must be granted in a meaningful time and a meaningful manner. *Id.* at 378 (*citing Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). In addition, a defendant is entitled to have the class defined properly, with an adequate class representative so that absent class members cannot subject the defendant to additional litigation after judgment. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).[13]

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[13] Most recently, this Court addressed due process concerns in a class action in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

The Arkansas Supreme Court's failure to conduct a rigorous analysis has deprived BNL of its due process rights in a number of ways. BNL is entitled to know precisely the identity of persons making claims against BNL, the factual basis for such claims, and the legal issues involved. BNL is entitled to the opportunities to have discovery relating to the claims (even discovery from the claimants, putative class members), to challenge the credibility of the claimants, to gather information and prepare defenses to such claims and to a fair and realistic opportunity to have the plaintiffs' claims and BNL's defenses presented to a tribunal. Literally all of these entitlements are denied to BNL in the present case. BNL is being forced to trial by involuntary, phantom plaintiffs with ostensible claims based on Personal Interpretations and non-existent facts. Even if BNL wins the trial on the merits of this improper class, BNL's favorable judgment may be subject to collateral attack. A rigorous analysis protects BNL's rights and the rights of all other class action defendants and protects against the terrorism of improper class actions. In BNL's view, there cannot be a proper class in this case and to proceed as a class will be "trial by ambush." Such blatant disregard for the controlling precedent is in diametric opposition to decisions rendered by this Court, the United States circuit courts of appeal, and other state courts of last resort.[14]

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[14] The Arkansas Supreme Court's decisions are in conflict with decisions of this Court and, thus, present a compelling reason to grant review pursuant to Supreme Court Rule 10(c). Similarly, the Arkansas Supreme Court's decisions conflict with decisions rendered by United States courts of appeal and other state courts of last resort. Therefore, this petition further illustrates compelling reasons to grant review pursuant to Supreme Court Rule 10(b).

II. THE DECISION CONFLICTS WITH *GENERAL TELEPHONE COMPANY OF THE SOUTHWEST V. FALCON* AND OTHER DECISIONS OF THIS COURT

Rule 23 is a procedural device only. It cannot infringe upon the rights of the defendants and to do so violates, at the very least, defendants' constitutional rights of Fourteenth Amendment Due Process. This Court positively expressed the need for a rigorous analysis when considering class certification in *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147 (1982), an employment discrimination case. Besides noting the necessity of a rigorous analysis in *Falcon*, this Court reviewed the basis for class certification:

> The class-action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. Class relief is peculiarly appropriate when the issues involved are common to the class as a whole and when they turn on questions of law applicable in the same manner to each member of the class. For in such cases, the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.

Id. at 155 (internal citation and quotations omitted). This Court also reminded trial courts of the scrutiny with which class actions are to be analyzed when stating, "We have repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members. *Id.* at 156 (citations omitted). In particular, this Court focused on the need to provide trial courts with guidance on class certification. The *Falcon* Court emphasized that "without any specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent, it was error for the District Court to presume that

respondent's claim was typical of other claims . . . ." *Id.* at 159 (footnote omitted).

In reversing the trial court's grant of class certification, this Court cautioned lower courts who too quickly dispose of critical facts during the certification process. Indeed, this Court expressed that:

> The District Court's error in this case, and the error inherent in the across-the-board rule, is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a). As we noted in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.* at 469 (*quoting Mercantile Nat. Bank v Langdeau*, 371 U.S. 555, 558 (1963).

Falcon, 457 U.S. at 160. In sum, the *Falcon* Court established that class certification should focus on how the relevant factual and legal issues pertain to the prerequisites of Rule 23. "[A]ctual, not presumed, conformance with Rule 23(a) remains, however, indispensable." *Id.* In its last substantive paragraph, the *Falcon* Court closed by profoundly stating that:

> With the same concerns in mind, we reiterate today that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, *after a rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied.

Id. at 161 (emphasis added).

The critical analysis pronounced in *Falcon* was most recently applied in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 1999 WL 412604 (June 23, 1999), where this Court set aside a class certification order for a second time and strongly criticized the United States Court of Appeals for the Fifth Circuit. The Court admonished that Rule 23, a rule of procedure,

"shall not abridge, enlarge or modify any substantive rights." *Id.* at *14. The Court further warned that allowing for exigencies in the level of Rule 23 scrutiny would almost guarantee exigencies because of the economic temptations on counsel in class actions. *Id.* at *24.

Similarly, the Court addressed the propriety of a close examination of class certification in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). In that case, the United States Court of Appeals for the Third Circuit reversed a district court's class certification and, finding that the superiority requirement had been met, held that the complexity of the case prevented its trial. *Id.* On appeal, this Court affirmed the denial of class certification. The Court restated that class action cases require a "close look" before they are accepted and issued the following rebuke:

> In the decades since the 1966 revision of Rule 23, class action practice has become ever more "adventuresome" . . . . The development reflects concerns about the efficient use of court resources . . . . The Rule 23 . . . predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.

Id. at 617-18, 623.

This Court has recognized the need for a careful analysis of the "predominance" and "superiority" factors. In discussing the level of inquiry under Rule 23(b)(3), the Court noted in *Amchem*:

> Framed for situations in which "class-action treatment is not as clearly called for" as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit "may nevertheless be convenient and desirable." Adv. Comm. Notes, 28 U.S.C. App., p. 697. To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must "predominate over

> any questions affecting only individual members"; and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." In adding "predominance" and "superiority" to the qualification for certification list, the Advisory Committee sought to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Ibid.* Sensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systematic efficiency on the other, the Report for the 1966 amendments cautioned: "The new provision invites a close look at the case before it is accepted as a class action . . . . " Kaplan, Continuing Work 390.

Id. at 615.

Class actions are supposed to lighten the case load. Instead, they have clogged courts at all levels and become a bingo jackpot for lawyers. Improper class certifications irreparably harm defendants, especially growing businesses like BNL. BNL and the putative class members, who respondents are seeking to "help," are experiencing irreparable farm from this improper class action. BNL cannot raise new capital needed to expand its excellent growth, cannot seek acquisitions to improve the company and is being impaired in attracting agents and brokers. Respectfully, the Court probably believed that its holdings in *Eisen, Falcon, Amchem* and *Ortiz* were more than clear and that other courts could easily follow them. Unfortunately, petitioners must ask the Court to "go to bat again." The Arkansas Supreme Court improperly places the *Eisen* doctrine in a superior position to the *Falcon* doctrine. Further, the Arkansas Supreme Court makes no attempt to use both *Eisen* and *Falcon* in harmony. That inadequate approach violates BNL's due process rights.

III. THE DECISION CONFLICTS WITH DECISIONS OF UNITED STATES COURTS OF APPEAL

The class certification approach taken by Arkansas courts is in direct conflict with the circuit courts of appeal. While the decisions by the circuit courts of appeal are based on Federal Rule 23, the Arkansas Supreme Court has repeatedly stated that Arkansas Rule 23 should be construed in uniformity with Federal Rule 23.[15] Indeed, the Arkansas Supreme Court has recently relied on federal cases in its class certification decisions. *See Mega Life*, 954 S.W.2d 898 (Ark. 1997). Therefore, all federal court decisions directly bear on the approach by Arkansas state courts.

As earlier established, the Arkansas Supreme Court does not recognize—in fact, has expressly rejected—any requirement for a rigorous analysis during class certification. This approach is in stark contrast to the approach followed by the circuit courts of appeal.

For example, the United States Court of Appeals for the Fifth Circuit applied the rigorous analysis principles in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). In *Castano*, plaintiffs filed suit alleging fraud, negligence, breach of warranty, strict liability and violation of consumer statutes. The plaintiffs sought class certification for "all nicotine-dependent persons in the United States . . . who have purchased and smoked cigarettes manufactured by the defendants." *Id.* at 737. After reviewing the requirements of Federal Rule 23, the trial court certified the class. The trial court in *Castano* relied on *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), when deciding that it could not inquire into the merits to determine whether reliance on the alleged fraud would be an issue when considering the predominance and superiority requirements. On appeal, the Fifth Circuit re-

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[15] *See* note 5, *supra*.

versed the certification order. The Fifth Circuit recognized that although the decision to certify is within the discretion of the trial court, a district court is required to conduct a rigorous analysis before certifying a class under Rule 23. *Castano*, 84 F.3d at 740. The Fifth Circuit expressly stated that the trial court erred in not considering how a trial on the merits would be conducted with regard to the predominance requirement. The Fifth Circuit further held that a district court must look past the pleadings to understand "claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues." *Id.* at 744 (*citing Falcon*, 457 U.S. at 160). The Fifth Circuit strongly admonished the trial court for so easily permitting class certification in violation of this Court's rigorous analysis standard. Such a rigorous analysis is necessary to prevent the unfathomable economic threat, the magnification and strengthening of unmeritorious claims, the ability to skew trial outcomes, and the fostering of judicial blackmail that class actions impose on the defendants. *Id.* at 746.

Similarly, the United States Court of Appeals for the Sixth Circuit applied the rigorous analysis principles to the commonality and typicality requirements of a class action in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (en banc). In *Sprague*, the plaintiff sought class certification for several thousand former employees of the defendant for ERISA violations.[16] The trial court certified a class of early retirees who allegedly were due lifetime health care benefits by the defendant. These benefits were based on written statements accepting the program's terms, oral statements accepting the terms, and even those who simply retired for whom no documents were found. After reviewing the rigorous analysis requirement, the Sixth Circuit stated that these variations clearly lacked commonality. In reversing the

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[16] Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*

trial court, the Sixth Circuit stated that plaintiffs could not prove that the defendant gave the same representations to each class member and that the class representatives' claims were not typical of the class due to the particular individual interactions. In sum, "[c]lass-wide relief was awarded here without any necessary connection to the merits of each individual claim. Rule 23 does not permit that result." *Id.* at 399.

Additionally, the United States Court of Appeals for the District of Columbia Circuit has thoroughly addressed the rigorous analysis requirement in *Hartman v. Duffey*, 19 F.3d 1459 (D.C. Cir. 1994). In *Hartman*, the plaintiffs, a group of female applicants, brought a class action based on illegal employment discrimination by the United States Information Agency (U.S.I.A.). The women asserted that they were denied positions based on their sex and that the male interviewer explicitly indicated so. The trial court certified the class of "all women who have applied for employment with or are currently employed by the [U.S.I.A.] and who have been or continue to be adversely affected by the [U.S.I.A.'s] discriminatory employment practices." *Id.* at 1461-62. On appeal, the District of Columbia Circuit heavily relied on *Falcon*, and reversed the trial court. The circuit court scolded the district court for not critically analyzing the commonality and typicality requirements of Rule 23. In fact, the circuit court noted that:

> As *Falcon* made clear, there is more to a showing of commonality than a demonstration that class plaintiffs suffered discrimination on the bases of membership in a particular group . . . . [The] complaint and motions for class certification . . . evince a complete absence of factual allegations regarding the commonality or typicality requirements of Rule 23. This failure is compounded by the fact that prior to entry of the conditional class certification, the trial court apparently did not conduct any evidentiary hearing or other factual determination that

> would qualify as a rigorous analysis of whether the prerequisites for a class action had been met.

Hartman, 19 F.3d at 1472-73.

The Arkansas Supreme Court is making mistakes like those rejected in *Castano*, *Sprague*, and *Hartman*. The Arkansas Supreme Court does not even mention these cases in its opinion. In sum, the Arkansas Supreme Court has significantly diverged from the circuit courts on this important constitutional point.[17]

IV. THE DECISION CONFLICTS WITH DECISIONS OF STATE SUPREME COURTS

Besides conflicting with the decisions of this Court and the circuit courts of appeal, the Arkansas approach also conflicts with the approach taken by its sister states. For example, the Texas Supreme Court in *Southwestern Refining Company, Inc. v. Bernal*, 2000 WL 566745 (Tex. May 11, 2000), reversed a class certification order because the trial court and intermediate court of appeals failed to properly apply the predominance requirement. The Texas Supreme Court strongly stated that it "reject[s] this approach of *certify now and worry later*." *Id.* at *8 (emphasis added).

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[17] For additional circuit cases recognizing the importance of a rigorous analysis, see *Waste Management Holding, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000); *J.B. v. Valdez*, 186 F.3d 1280 (10th Cir. 1999); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999); *Marisol v. Giuliani*, 126 F.3d 372 (2d Cir. 1997); *In re American Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *Jones v. Firestone Tire and Rubber Co.*, 977 F.2d 527 (11th Cir. 1992); *Hanon v. Dataproducts Corp.*, 976 F.2d 497 (9th Cir. 1992); and *Reed v. Bowen*, 849 F.2d 1307 (10th Cir. 1988). More notably, the United States Court of Appeals for the Eighth Circuit, the circuit encompassing the State of Arkansas, also recognizes the rigorous analysis approach. *See In re Milk Products Antitrust Litig.*, 195 F.3d 430 (8th Cir. 1999); and *Hervey v. City of Little Rock*, 787 F.2d 1223 (8th Cir. 1986).

The Texas Supreme Court pronounced that "courts must perform a 'rigorous analysis' before ruling on class certification to determine whether all prerequisites to certification have been met." *Id.* at *9 (*citing Falcon*). "Thus it is improper to certify a class without knowing how the claims can and will likely be tried. *See Castano v. American Tobacco Company*, 84 F.3d 734, 744 (5th Cir. 1996). A trial court's certification order must indicate *how the claims will likely be tried* so that conformance with Rule 42 [class action rule] may be meaningfully evaluated." *Id.* (*citing Falcon*) (emphasis added).

In another recent class certification case, *Ford Motor Co. v. Sheldon*, 2000 WL 566766 (Tex. May 11, 2000), the Texas Supreme Court noted that "there is no right to litigate a claim as a class action." *Id.* at *8. In *Sheldon*, the court reversed a class certification order and remanded to the trial court to decertify the class on the grounds that the class was improperly defined because the definition required an inquiry into the merits to determine the class members. In reversing certification, the Texas Supreme Court held that, "the failure to adequately define a proposed class implicates due process rights." *Id.* at *9. The *Sheldon* court reiterated that a class definition cannot stand when it requires individual adjudications to determine membership. *Id.* (*citing Metcalf v. Edelman*, 64 F.R.D. 407 (N.D. Ill. 1974)). Indeed, "[s]uch a monumental task at the outset defeats the benefits of the class action." *Id.* Further, the *Sheldon* court logically and properly admonishes that if the determination of the proper class definition requires an inquiry into the merits, the class cannot be certified.

The Supreme Court of South Carolina has also recognized the necessity for a rigorous analysis. *Waller v. Seabrook Island Property Owners Ass'n*, 388 S.E.2d 799 (S.C. 1990). In *Waller*, the South Carolina Supreme Court stated: "Proponents of the class certification have the burden of proving

these prerequisites of class certification have been met. It is imperative the court apply a rigorous analysis to assure the prerequisites of Rule 23(a) have been satisfied." *Id.* at 801 (*citing Falcon*) (citation omitted).

It is quite clear that these and some other state courts have grasped the necessity of conducting a rigorous analysis.[18] Yet, Arkansas has intentionally repudiated this approach. The Arkansas approach can certainly be characterized as the "certify now and worry later" approach rejected by the Texas Supreme Court in *Bernal*. Correction through immediate review by this Court is a matter of constitutional life or death for class action defendants.

V. BROADER IMPLICATIONS—*FALCON* VERSUS *EISEN*

The Arkansas Supreme Court has uncovered an inherent incongruity between *General Telephone Company of the Southwest v. Falcon*, 457 U.S.147 (1982), and *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) . Both the trial court and Arkansas Supreme Court characterize BNL's request for a rigorous analysis as an improper intrusion into the merits. (R. 3108-10, 3272-73); *BNL Equity Corp. v. Pearson*, 10 S.W.3d 838, 841 (Ark. 2000). The trial court and Arkansas Supreme Court relied upon *Eisen* when they erroneously concluded that BNL required a delving into the merits and, thus, summarily dismissed *Falcon*'s rigorous analysis asserted by BNL.

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[18] *See also Ex Parte Mayflower Nat's Life Ins. Co.*, 2000 WL 548211 (Ala. May 5, 2000); *Carroll v. Cellco Partnership*, 713 A.2d 509 (N.J. Super. Ct. Div. 1998) (applying a rigorous analysis and criticizing the trial court's oversimplification of the management of the litigation by stating: "But where would defendant's right to cross-examine each plaintiff be accommodated? For example, a plaintiff who claimed to be defrauded but who renewed the contract for the next year would have a serious credibility problem." *Id.* at 518).

The Arkansas Supreme Court and trial court improperly relied on *Eisen*. In *Eisen*, the trial court conducted an evidentiary hearing to specifically determine which party would prevail at trial in order to shift the burden of paying for class action notice. *Eisen*'s proscription for delving into the merits cannot be used as a shield to avoid following *Falcon*'s rigorous analysis doctrine. Granting this Petition for Certiorari will provide the opportunity for this Court to explain how *Eisen*'s "delving into the merits" doctrine can be harmonized with the procedures, limitations and constitutional protections of *Falcon*'s "rigorous analysis" doctrine. This constitutional consonance is paramount in class action cases and the lower courts need guidance on how to apply these two cases congruently.

This case and every other class action in Arkansas courts should be evaluated with careful attention to determine whether the goals of class treatment will really be accomplished. As this case exemplifies, the rulemaker's prescriptions for class certification may be endangered by those who embrace Rule 23 too enthusiastically just as they are by those who approach the rule with distaste. *Amchem Products, Inc. v. Windsor*, 521 U.S. 590, 629 (1997). The struggle between "delving into the merits" and the need for a "rigorous analysis" is present not only in Arkansas, but throughout all class certifications across the country.

While continuously admonishing all class action defendants to stay out of the merits, the Arkansas Supreme Court has simultaneously misconstrued both *Eisen* and *Falcon* by interpreting *Eisen* too broadly and *Falcon* too narrowly. The Arkansas Supreme Court's rejection of the rigorous analysis has taken away the defendants' constitutional shield of due process and has instead replaced it with the striking dagger of a superficial inquiry. This substandard and empty inquiry violates the due process rights of all class action defendants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 13, 2000

APPENDIX

APPENDIX

SUPREME COURT OF ARKANSAS

99-78

BNL EQUITY CORP.

v.

PEARSON

Opinion delivered February 10, 2000

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1. ACTION—CLASS ACTION—CERTIFICATION—TRIAL COURT'S DISCRETION.—The determination whether Ark. R. Civ. P. 23 criteria of typicality, predominance, and superiority have been satisfied and whether a class action should proceed rests within the broad discretion of the trial court and will not be reversed absent an abuse of discretion.

2. ACTION—CLASS ACTION—CERTIFICATION—WHETHER PLAINTIFF CLASS WILL PREVAIL ON MERITS IS IMMATERIAL.—Whether the plaintiff class will ultimately prevail on the merits is immaterial to the issue of class certification.

3. ACTION—CLASS ACTION—CERTIFICATION—MERITS OF UNDERLYING CLAIM NOT SUBJECT TO EXAMINATION.—The supreme court will not look to the merits of class claims or to appellants' defenses in determining the procedural issue of whether the elements of Ark. R. Civ. P. 23 have been satisfied.

4. ACTION—CLASS ACTION—CERTIFICATION—ESSENCE OF TYPICALITY REQUIREMENT.—The essence of the

typicality requirement is the conduct of the defendants and not the varying fact patterns and degree of injury or damage to individual class members.

5. ACTION—CLASS ACTION—CERTIFICATION—WHEN CLAIMS ARE TYPICAL.—Claims are typical when they arise from the same wrong allegedly committed against the class.

6. ACTION—CLASS ACTION—CERTIFICATION—TYPICALITY REQUIREMENT SATISFIED.—Where appellee class representatives alleged a common wrong by appellants that affected every class member, namely, conduct entailing two misrepresented public offerings and allegations that appellants induced investors to invest in a company with either false statements or omissions in two offering prospectuses and a scripted sales presentation, the supreme court was persuaded that appellees had established that their claims were typical of all class members for certification purposes and concluded that the trial court did not abuse its discretion on the question of typicality.

7. ACTION—CLASS ACTION—CERTIFICATION—COMMON QUESTION OF LAW OR FACT EXISTED.—The supreme court concluded that a common question of law or fact existed for all class members, relating to allegations of fraudulent representations or omissions by appellants in two prospectuses and scripted sales presentation that induced the class members to buy certain securities.

8. ACTION—CLASS ACTION—CERTIFICATION—RESOLUTION OF QUESTION OF MISREPRESENTATION PREDOMINATED OVER POTENTIAL INDIVIDUAL ISSUES.—Where a common question of misrepresentation under Ark. Code Ann. § 23-42-106(a)(1) (Supp. 1999) was the linchpin of every class member's case and must be resolved as the first step, resolution of the issue

predominated over potential individual issues relating to investor knowledge or affirmative defenses.

9. ACTION—CLASS ACTION—CERTIFICATION—TRIAL COURT CORRECTLY FOUND PREDOMINANCE REQUIREMENT SATISFIED.—The supreme court held that the trial court correctly found that the wrongful conduct alleged was common to the class and that this issue of liability predominated over individual questions.

10. ACTION—CLASS ACTION—CERTIFICATION—SMALLNESS OF CLAIMS AS FACTOR IN DECIDING SUPERIORITY.—The avoidance of a multitude of suits lies at the heart of any class-action certification; although smallness of the claims may not be the sole basis for certifying a class, it is a factor to be considered in deciding superiority.

11. ACTION—CLASS ACTION—LIMITATION OF ISSUES—JUDICIAL EFFICIENCY.—Without the class-action procedure, numerous meritorious claims might go unaddressed; by limiting the issues to be tried to the ones that are common to all class members, the trial court can achieve real efficiency.

12. ACTION—CLASS ACTION—CERTIFICATION—SUPERIOITY REQUIREMENT MET.—The supreme court concluded that a class action would be fair to both sides and that the superiority requirement had been met.

13. ACTION—CLASS ACTION—MANAGEMENT—TRIAL COURT'S SUBSTANTIAL POWER.—The ability to manage and guide a class action is a necessary part of a trial court's decision to certify; substantial power is vested in the trial court to manage a class action.

14. ACTION—CLASS ACTION—MANAGEMENT—TRIAL COURT'S ABILITY TO DECERTIFY.—The trial court has the ability to decertify should a class action become too unwieldy; under Ark. R. Civ. P. 23(b), an order "may be

conditional and it may be altered or amended before the decision on the merits"; this flexibility in the trial court is vital to judicious use of the class device.

15. ACTION—CLASS ACTION—MANAGEMENT—PLACED IN TRIAL COURT.—The supreme court had no hesitancy in placing the management of the class action in question in the trial court.

16. ACTION—CLASS ACTION—CERTIFICATION—CONSIDERATION OF LIMITATIONS DEFENSE INAPPROPRIATE AT CLASS-CERTIFICATION STAGE.—Any analysis of a limitations defense at the class-certification stage is a merits determination and, therefore, inappropriate; although the trial court was correct in stating that consideration of the limitations defense amounted to delving into the merits, after stating the law correctly in its order, the trial court proceeded to decide the limitations question; it was error for the court to do so.

17. APPEAL & ERROR—SUPREME COURT WOULD NOT SPECULATE OR ISSUE ADVISORY OPINION.—The supreme court would not speculate on the question of the inevitability of bifurcated trials or issue an advisory opinion on an issue that might well not develop.

18. COURTS—JURISDICTION—DEFENDANT CANNOT ASSERT EQUITABLE DEFENSE & DIVEST PLAINTIFF OF CIRCUIT COURT JURISDICTION.—Although it is true that laches is a defense cognizable only in equity when equitable relief is sought, it is not true that a defendant can assert an equitable defense to a complaint at law and thereby divest a plaintiff of jurisdiction to have his claim heard in circuit court.

19. ACTION—CLASS ACTION—CERTIFICATION—TRIAL COURT DID NOT ABUSE DISCRETION IN ANY RESPECT.—The supreme court concluded that the trial court did not

abuse its discretion in any respect in certifying the class in the case; affirmed.

Appeal from Pulaski Circuit Court; *John Ward*, Judge; affirmed.

Friday, Eldredge & Clark, by: *Larry W. Burks, Harry A. Light*, and *Ellen M. Owens*, for appellants.

Pender, McCastlain & Ptak, P.A., by: *James R. Pender* and *Michael J. Ptak;* and *Williams & Anderson LLP*, by: *Peter G. Kumpe, John E. Tull III*, and *Stephen B. Niswanger*, for appellees.

Robert L. Brown, Justice. This is an appeal from an order by the trial court granting class certification to the proposed class under Ark. R. Civ. P. 23. The appellants in this appeal are BNL Financial Corporation, the parent company (BNL); BNL Equity Corporation, a wholly-owned subsidiary of the parent; Brokers National Life Assurance Company, a wholly-owned subsidiary of BNL Equity Corporation (BNLAC); Wayne Ahart, chairman of the board of BNL Financial and BNLAC, and also chairman of the board of the predecessor companies; Kenneth Tobey, president of BNL Financial and BNLAC, and president of the predecessor companies; Barry Shamas, executive vice president of BNL Financial and BNLAC, and vice president of the predecessor companies. Prior to 1994, the predecessor company for BNL was United Arkansas Corporation (UAC) and the predecessor company for BNLAC was United Arkansas Life Assurance Company (UALAC). The appellees in this appeal are the plaintiffs and class representatives in the class action—Myra Jo Pearson, Paul Pearson, and James Stilwell.

On April 30, 1996, the Pearsons filed the original complaint against the appellees for violation of the Arkansas Securities Act and specifically for violation of Ark. Code Ann. § 23-42-106(a)(1) (Supp. 1999). The defendants moved the trial court to dismiss the case for lack of subject-matter

jurisdiction or to transfer the case to chancery court because the equitable defense of laches had been asserted. The motion was denied. On May 19, 1998, Stilwell joined as a party plaintiff in the third amended complaint. The cause of action centered around misrepresentations or omissions in two public offering prospectuses and a scripted sales presentation. The first public offering sought purchasers of stock in UAC between the dates of May 1, 1989, and May 1, 1991. The second public offering also sought purchasers of stock in UAC. That offering commenced on May 1, 1991, and ended on May 1, 1992.

According to their complaint, the Pearsons purchased stock under both offerings on the dates of April 24, 1991; May 9, 1991; and February 20, 1992. Their total investment in UAC stock was $10,660. Stilwell purchased stock under the first offering on August 30, 1990. His total investment was $2,000. During the first offering, UAC raised $4,110,050 from 1,251 investors. Under the second offering, it raised $2,071,300 from 590 investors.

In their complaint, the Pearsons and Stilwell alleged pervasive deception by the appellants with regard to their entire investment plan. Specifically, the Pearsons and Stilwell alleged five material misrepresentations or omissions of material facts that were made through the use of the two public offering prospectuses and the scripted sales presentation. Those misrepresentations or omissions were: (1) that UAC's primary business objective and principal business activity would be the ownership and operation of a life insurance subsidiary which would primarily offer customary forms of life insurance products; (2) that UAC and its life insurance subsidiary (UALAC) would hire and license captive sales agents and that the captive sales force would use a one-on-one sales method with clients and use personal visits by agents to homes and businesses; (3) that there were no then-existing opportunities known to UAC or its management

to purchase any existing insurance company or other business; (4) that the key management team of UAC, primarily appellants Ahart, Shamas, and Tobey, had achieved a strong record of success and built four successful insurance holding companies; and (5) that appellant Tobey had nine or ten years experience in the life insurance business. According to the complaint, contrary to these representations, the primary business activity of the appellants has been dental insurance, a captive sales force was not utilized, opportunities to purchase existing insurance companies were available, and the experience of the management team in the insurance business was misrepresented. The plaintiffs tendered their shares of UAC to the company and prayed for class certification, damages, interest, and attorneys' fees.

The Pearsons and Stilwell moved the trial court to certify a class consisting of all of the purchasers of UAC stock under the first and second offerings. A hearing was held, and briefs were submitted by the parties.

On August 27, 1997 [sic], the trial court entered an order granting class certification.

I. Rule 23 Arguments

The primary thrust of the appellants' appeal is that these multiple lawsuits simply cannot be tried as a class action because the Rule 23 criteria of typicality, predominance, and superiority have not been met. *See* Ark. R. Civ. P. 23(a) & (b). The claims of the class representatives are atypical, according to the appellants. Moreover, they contend that common issues of law or fact do not predominate over individual issues. They point out, in particular, that the knowledge of each investor about the investment purchased is an element of the alleged Securities Act violation under § 23-42-106(a)(1). Thus, individual trials on the knowledge issue would be a necessity. In short, they contend that a class action is not the superior means of resolving the multiple

causes of action. As a secondary matter, they urge that should this court affirm the class certification, it should direct the trial court to provide more specifics on how the matter will be managed and tried.

[1] We have held that the determination of whether Rule 23 criteria have been satisfied and whether the class action should proceed rests within the broad discretion of the trial court and will not be reversed absent an abuse of discretion. *See, e.g., Fraley v. Williams Ford Tractor and Equip. Co.*, 339 Ark. 322, 5 S.W.3d 423 (1999); *Mega Life & Health Ins. Co. v. Jacola*, 330 Ark. 261, 954 S.W.2d 898 (1997); *International Union of Elec., Radio & Mach. Workers v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988) (broad discretion in trial court extends to protection of absent class members but also to question of whether class action should proceed).

Before we examine the Rule 23 criteria, however, we feel constrained to address a common thread that runs throughout the appellants' appeal. The appellants contend that discussion of the Rule 23 criteria must, by necessity, bring into play some examination of the merits of the claims including their defenses, and that we should not rigidly enforce our proscription against a merits analysis at this stage. Without weighing the merits, the appellants posit that this court cannot decide whether the claims of the class representatives are typical or that claims of the class members are common and predominate.

[2] The appellants, however, are plowing old ground in raising an issue that has clearly been decided by this court. Most recently, we said:

> We have held that neither the trial court nor the appellate court may delve into the merits of the underlying claim in determining whether the elements of Rule 23 have been satisfied. In that regard a trial court

> may not consider whether the plaintiffs will ultimately prevail, or even whether they have a cause of action. Thus, the propriety of a class action is "basically a procedural question." (Citations omitted.)

Fraley v. Williams Ford Tractor & Equip. Co., 339 Ark. at 335, ___ S.W.3d at ___ (1999). In *Fraley*, we held that the trial court could not examine the affirmative defenses of release and consent in deciding whether the class should be certified. The *Fraley* case was not an anomaly. This court has been consistent in holding that, whether the plaintiff class will ultimately prevail on the merits is immaterial to the issue of class certification. *See, e.g., Mega Life & Health Ins. Co. v. Jacola, supra; Farm Bureau Mut. Ins. Co. v. Farm Bureau Policy Holders & Members*, 323 Ark. 706, 918 S.W.2d 129 (1996).

[3] We hold once more that we will not look to the merits of the class claims or to the appellants' defenses in determining the procedural issue of whether the Rule 23 factors are satisfied. We turn then to the Rule 23 criteria of typicality, predominance, and superiority, which we will discuss *seriatim*. We will conclude by addressing the management point.

a. Typicality

Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." The appellants vigorously contend that the amount of information provided to the Pearsons and Stilwell concerning their UAC investments defeats their ability to show that their knowledge is *typical* of the knowledge of all other class members, as Rule 23(a)(3) requires. They further argue that there are substantial questions relating to unique defenses applicable to the Pearsons and Stilwell that would not be applicable to other class members. Their argument is best summarized by a statement on this point from the Second

Circuit Court of Appeals that a class certification is not appropriate when a putative class representative is subject to unique defenses that threaten to become the focus of the litigation. *See Gary Plastic Packaging v. Merrill Lynch*, 903 F.2d 176 (2nd Cir. 1990), *cert denied.* 498 U.S. 1025 (1991).

[4] We disagree that typicality is lacking in the instant case. Our caselaw is clear that the essence of the typicality requirement is the conduct of the defendants and not the varying fact patterns and degree of injury or damage to individual class members. *See Mega Life and Health Ins. Co. v. Jacola, supra; Direct Gen. Ins. Co. v. Lane*, 328 Ark. 476, 944 S.W.2d 528 (1997); *Farm Bureau Mut. Ins. v. Farm Bureau Policyholders, supra; Chequenet Systems, Inc. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956 (1995); *Summons v. Missouri Pac., R.R.*, 306 Ark. 116, 813 S.W.2d 240 (1991); *see also* I Herbert B. Newberg, *Newberg on Class Actions*, § 3.13, at 74-77 (3d ed. 1992).

[5] We have stated that "claims are typical when they " 'arise from the same wrong allegedly committed against the class.' " *Farm Bureau Mut. Ins. Co.*, 323 Ark. at 711, 918 S.W.2d at 131, *quoting Chequenet Systems, Inc. v. Montgomery*, 322 Ark. at 749, 911 S.W.2d at 959. In the case before us, there is no question but that the class representatives have alleged a common wrong by the appellants that affects every class member. That conduct surrounds two misrepresented public offerings and the allegations that the appellants induced investors to invest in UAC with either false statements or omissions in the two offering prospectuses and the scripted sales presentation.

[6] We are persuaded that the Pearsons and Stilwell have established that their claims are typical of all class members for certification purposes. There was no abuse of discretion by the trial court on this point.

b. Preponderance

The appellants next contend that rule 23(b) requires that the trial court find that "the questions of law and fact common to the members of the class predominate over any questions affecting only individual members," and that that requirement has not been met. They urge that the predominance difficulty in this case relates to the three-year time period for the alleged wrongdoing and the varying degrees of knowledge of individual class members about the offerings during that time frame. For example, they show this court that the first offering covered the period between May 1, 1989, and May 1, 1991, and that the second offering covered the period between May 1, 1991, and May 1, 1992. They then argue that though the class representatives only base their claims on three documents (first offering prospectus, second offering prospectus, and a scripted sales presentation), there was a "host of other information" available to prospective investors in UAC stock during this time. As examples, they direct us to the thirty-two regional meetings held for potential shareholders and investors; a 1991 annual report on the company; an April 10, 1992 letter and brochure sent to shareholders; and forty-four public filings with the Arkansas Insurance Commissioner relating to the insurance being offered by UAC and UALAC.

The appellants contend that the availability of this additional information to class members raises substantial individual questions of the degree of knowledge surrounding the UAC investment. They claim that by defining the class as all purchasers who purchased UAC's securities, the trial court's analysis was "too cursory" and ignored the critical element of each class member's cause of action, which is that purchaser's knowledge of what the investment entailed. They maintain that this court has previously refused to certify a class in two mass tort actions in the medical field where individual issues relating to knowledge predominated. *See*

Baker v. Wyeth-Ayerst Lab. Div., 338 Ark. 242, 992 S.W.2d 797 (1999); *Arthur v. Zearley,* 320 Ark. 273, 895 S.W.2d 928 (1995).

[7] The starting point for our examination of the predominance issue is whether a common question of law or fact exists in this case for all class members. *See* Ark. R. Civ. P. 23(b); *Mega Life & Health Ins. Co. v. Jacola, supra. Lemarco, Inc. v. Wood,* 305 Ark. 1, 804 S.W.2d 724 (1991); *International Union of Elec., Radio & Mach. Workers, supra.* We conclude that it does. That common question relates to the allegations of fraudulent representations or omissions by the appellants in the two prospectuses and scripted sales presentation which induced the class members to buy the UAC securities. The next issue is whether this common question predominates over individual questions. We believe that it does.

This case, to our way of thinking, raises an issue comparable to that asserted in *Seeco, Inc. v. Hales,* 330 Ark. 402, 954 S.W.2d 234 (1997). There, the argument mounted by the defendants was that the class sought recovery on a fraud theory which required, as an element, proof of reliance on the misrepresentation by each class member. We held that even though lack of reliance by individual class members might be an argument raised by the defendants as a defense, the existence of the alleged scheme to defraud royalty owners was a common question for all class members. We concluded that the alleged scheme was the overarching issue and the starting point in resolving the matter. We held to the same effect in *Fraley v. Williams Ford Tractor and Equip. Co., supra,* where the plaintiffs alleged that the equipment dealer had intentionally converted insurance premiums from the class members as the central fraudulent scheme. Proof of that scheme, we concluded, predominated over individual questions.

[8] Similarly, in the case at hand, a common question of misrepresentation under § 23-42-106(a)(1) is the linchpin of every class member's case and must be resolved as the first step. Resolution of this issue predominates over potential individual issues relating to investor knowledge or affirmative defenses.

The medical mass tort cases, on the other hand, are readily distinguishable in that individual issues clearly predominated in those cases. In *Arthur v. Zearley, supra,* the thrust of the plaintiffs' cause of action in the Orthoblock cases was lack of informed consent under the medical Malpractice Act, which necessarily brought into play the extent of the information imparted to each patient by his or her physician and that patient's medical condition. In *Baker v. Wyeth-Ayerst Lab. Div., supra,* which was a products-liability case related to prescriptions for differing combinations of diet drugs, the cause of action was premised on varying combinations of drugs taken by each patient as well as time of patient usage, quantities taken, and medical histories. Thus, in neither *Arthur v. Zearley, supra,* nor *Baker v. Wyeth-Ayerst Lab. Div., supra,* did a common fraudulent scheme predominate over the individual circumstances of each patient. In short, the information conveyed by the defendant physicians varied with each patient in the Orthoblock cases and, likewise, the prescriptions of the diet pills in *Baker*, were patient specific. This is categorically different from the matter at hand where all class members predicate their claims of § 23-42-106(a)(1) misrepresentations on the offering prospectuses and the scripted sales presentation.

[9] We hold that the trial court correctly found that the wrongful conduct alleged is common to the class and that this issue of liability predominates over individual questions.

c. Superiority

Next, the appellants contest the trial court's conclusion "that a class action is superior to the other available methods for the fair and efficient adjudication of the controversy" under Rule 23(b). The appellants' contention on this point is analogous to their predominance argument. They claim that the trial court's "simple" finding that the class was numerous and the claims small was not enough to satisfy the superiority requirement. They again contend that the knowledge issue for individual claimants will render a class action grossly inefficient and will undercut any notion of judicial economy. Only three claimants filed the lawsuit, they emphasize, and this hardly justifies the time and expense of a class action.

[10] Again, we disagree. The avoidance of a multitude of suits lies at the heart of any class action certification. And though smallness of the claims may not be the sole basis for certifying a class, it is a factor to be considered in deciding superiority. *See International Union of Elec., Radio & Mach. Workers v. Hudson, supra.* Furthermore, here the alternative to a class action would be numerous joinders, wholesale intervention, and several hundred small lawsuits which would be totally inefficient and wholly unmanageable. Surely, neither the parties nor the judicial system would benefit from a legion of lawsuits that are numerous, duplicative, and time consuming. *See Snider v. Upjohn,* 115 F.R.D. 536 (E.D. Pa. 1987).

[11] There is, too, the point that without the class action procedure, numerous meritorious claims might go unaddressed. *See Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985). Plus, by limiting the issues to be tried to the ones that are common to all class members such as the alleged scheme of misrepresentation or omission and common defenses, the trial court can achieve real efficiency. *See Seeco, Inc. v. Hales, supra.*

The appellants raise the spectre that with the potential for individual suits splintering on issues like investor knowledge, trial of the class action could unravel and turn into a procedural nightmare. We will not speculate on this eventuality. We simply hold that at this stage there is a common issue related to the appellants' conduct and liability that predominates over individual questions and renders a class action the superior method for litigating the matter.

[12] We are further convinced that a class action is fair to both sides. As we said in *Seeco, Inc. v. Hales, supra,* and *Lemarco, Inc. v. Wood,* 305 Ark. 1, 804 S.W.2d 724 (1991), even if the trial court eventually decides that individual claims have to splinter in bifurcated proceedings, resolution of the issue of wrongful conduct common to all class members can achieve real efficiency as a starting point. We also note that there is a real benefit to the appellants in a class action in that they have the opportunity to nip multiple claims in the bud with common defenses such as the investors' knowledge of the investment purchased, lack of the appellants' knowledge concerning the misrepresentation, and statute of limitations. We conclude that the superiority requirement has been met.

d. Management

Because we hold that the contested Rule 23 criteria have been satisfied, we now address the appellants' request for guidance from the trial court on how the trial of this matter will be managed.

[13] We first observe that the trial court in this case has a firm grasp of what is involved in this class action as is evidenced by its well-reasoned, twenty-four-page order granting class certification. The trial court determined that a class action was appropriate, after analyzing the Rule 23 factors that are at issue in this appeal. This court has recognized that the ability to manage and guide a class action

is a necessary part of a trial court's decision to certify. *See International Union of Elec., Radio & Mach. Workers v. Hudson, supra.* We further have alluded to the substantial power in the trial court to manage a class action. *Id.; see also Summons v. Missouri Pac., R.R., supra.*

[14] We have also noted the ability of the trial court to decertify should the action become too unwieldy. Rule 23 specifically contemplates that circumstance when it states: "An order under this section may be conditional and it may be altered or amended before the decision on the merits." Ark. R. Civ. P. 23(b). In the recent case of *Fraley v. Williams Ford Tractor & Equip. Co., supra,* we quoted from *Newberg On Class Actions* regarding the decertification option and the fact that this flexibility in the trial court is vital to "judicious use of the class device." *See I Newberg On Class Actions* § 7.47, at 146 (3d ed. 1992).

[15] We have no hesitancy in placing the management of this class action in the trial court. That is what the rule contemplates, and, as already described, real efficiencies can be obtained by resolving common issues, both for the plaintiff class and the appellants. Were we, on the other hand, to speculate on class management or direct the trial court at this stage to present the parties with a management plan, we would be interfering in matters that clearly fall within the trial court's bailiwick.

II. Statute of Limitations

The appellants next take the trial court to task for refusing to consider their statute-of-limitations defense to class member claims as a class certification issue. The trial court was correct. We have made it clear in our cases that any analysis of the limitations defense at the class-certification stage is a merits determination, and, therefore, inappropriate. *See Fraley v. Williams Ford Tractor and Equip. Co., supra; see also Seeco, Inc. v. Hales, supra, quoting,* I Herbert B.

Newberg, *Newberg On Class Actions* § 4.26, at 104 (3d ed. 1992). The trial court was correct in stating that consideration of the limitations defense amounted to delving into the merits.

[16] Ironically, after stating the law correctly in its order, the trial court proceeded to decide the limitations question. It was error for the court to do so, and we will disregard its discussion of this issue.

III. General Issues

The appellants conclude that the trial court's certification order would require bifurcated trials. This raises, in their judgment, an issue under the Seventh Amendment to the United States Constitution. They contend that any process which contemplates using two different juries for one lawsuit to resolve common issues and individual issues violates this amendment.

[17] We said in *Seeco, Inc. v. Hales, supra,* when a comparable issue was raised under Article 7, Section 2, of the Arkansas Constitution, that we did not know at the certification point whether more than one jury would ultimately be necessary. This continues to be our position. We will not speculate on the question of the inevitability of bifurcated trials or issue an advisory opinion on an issue that well may not develop.

[18] The appellants also raise the issue of subject-matter jurisdiction in connection with their affirmative defense of laches. Raising this defense, they maintain, requires dismissal or a transfer of the entire case to chancery court. This is the same issue that was presented to the trial court in 1996 and denied. The appellants are incorrect in their conclusion. It is true that laches is a defense cognizable only in equity when equitable relief is sought. *See Landreth v. First National Bank,* 45 F.3d 267 (8th Cir. 1995); *J.W.*

Reynolds Lumber Co. v. Smackover State Bank, 310 Ark. 342, 836 S.W.2d 853 (1992). It is not true, however, that a defendant can assert an equitable defense to a complaint at law and thereby divest a plaintiff of jurisdiction to have his claim heard in circuit court. The appellants draw our attention to *Schultz v. Rector Phillips Morse, Inc.*, 261 Ark. 769, 522 S.W.2d 4 (1977), where we held that the affirmative defense of laches was applicable to a claim under the predecessor statute to § 23-42-106. But in *Schultz*, the plaintiffs initiated their suit in chancery court. That is altogether different from the situation we have before us.

[19] We conclude that the trial court did not abuse its discretion in any respect in certifying this class.

Affirmed.

THORNTON, J., dissents.

RAY THORNTON, Justice, dissenting. I am concerned that the court has opened the door to class actions without requiring the careful analysis that should be given before certification. The court once held that "with regard to Rule 23 motions, we have specifically stated that we will follow the federal rules in class actions" *Farm Bureau Mut. Ins. v. Farm Bureau Policy Holders*, 323 Ark. 206, 918 S.W.2d 129 (1996). However, we have eliminated the requirement under federal rules that there must be a rigorous analysis for certification as outlined in *General Telephone Company of South West v. Falcon*, 457 U.S. 147 (1982). *See Mega Life & Health Ins. Co. v. Jacola*, 330 Ark. 261, 954 S.W.2d 898 (1997).

In my view, we are approaching the point that class actions have been so extended that they elevate efficiency over legal principles. While I respectfully dissent from the direction the majority is taking, I recognize that the grounds for my dissent are being eroded by the cases we have recently decided. I respectfully dissent.

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS
THIRD DIVISION

Filed 98 Aug. 27 AM 2:52
Carolyn Staley
Circuit-County Clerk

No. 96-004971

MYRA JO PEARSON, PAUL PEARSON
AND JAMES E. STILWELL
Plaintiffs

VS.

BNL EQUITY CORPORATION (formerly
known as UNITED ARKANSAS CORPORATION), BNL
FINANCIAL CORPORATION (formerly known as
UNITED IOWA CORPORATION), and
WAYNE E. AHART, KENNY TOBEY,
and BARRY N. SHAMAS
Defendants

PROPOSED ORDER GRANTING CLASS CERTIFICATION

I.

INTRODUCTION

Plaintiffs seek class certification in connection with counts alleged in their Third Amended Class Action Complaint. The counts allege violations of the Arkansas Securities Act, specifically Ark. Code Ann. § 23-42-106 (Supp. 1997).

Pending before the Court are the following pleadings related to the issue of the propriety of class certification of this action:

(a) Motion for Class Certification (filed October 13, 1997);

(b) Plaintiffs' Brief in Support of Motion for Class Certification (filed October 13, 1997);

(c) Defendants' Preliminary Response in Opposition to Plaintiffs' Motion for Class Certification (filed October 27, 1997);

(d) Plaintiffs' Reply to Defendants' Preliminary Response in Opposition to Plaintiffs' Motion for Class Certification (filed November 6, 1997);

(e) Letter dated January 26, 1998 to the Honorable John Ward (filed February 4, 1998); and

(f) Plaintiffs' Pre-Trial Brief in Support of Class Certification (filed June 3, 1998).

This Court held a hearing in connection with the above-referenced pleadings on June 8, 1998. At the class certification hearing, the parties were permitted to call witnesses, if they so desired, for evidentiary purposes and to present oral arguments to the Court. In lieu of calling witnesses, Plaintiffs submitted into the record, without objection, the Affidavits of Plaintiffs Myra Jo Pearson, Paul Pearson, and James Stilwell, the Affidavit of Wayne Bennett, Advisory Board Member of Defendant BNL Equity Corporation, the Affidavit [sic] of two attorneys, H. William Allen and Thomas A. Mars, regarding the adequacy of Plaintiffs' counsel, and oral arguments. In opposition to class certification, Defendants presented the testimony of Defendant Wayne Ahart, Chairman of the Board of Defendant BNL Equity Corporation and oral arguments. Lastly, the parties were directed to submit proposed findings of fact and conclusions of law to the Court for its consideration. Based upon the foregoing, this Court has sufficient information to determine whether this action should

be certified as a class action pursuant to Rule 23 of the Arkansas Rules of Civil Procedure.

This Order, regarding whether this lawsuit should be certified as a class action, will be divided into the following four sections:

1. The determination regarding class certification does not reach the merits of the claims or defenses, but rather is an analysis and conclusion related to the procedural requirements of Ark. R. Civ. P. 23.

2. The law of class actions in Arkansas

   a. The Requirements of Rule 23(a)

      i. Numerosity

      ii. Commonality

      iii. Typicality

      iv. Adequacy of Representation

   b. The Requirements of Rule 23(b)

      i. Common questions of law or fact must predominate over individual questions

      ii. A class action must be superior to other available methods for the fair and efficient adjudication of the action

3. Findings of Fact and Conclusions of Law

4. The Decree

Each of these topics will be discussed and addressed below.

II.

THE DETERMINATION REGARDING CLASS CERTIFICATION DOES NOT REACH THE MERITS OF THE CLAIMS OR DEFENSES, BUT RATHER IS AN ANALYSIS AND CONCLUSION RELATED TO THE PROCEDURAL REQUIREMENTS OF ARK. R. CIV. P. 23.

This Court, by this Order, does not make findings of fact or conclusions of law in connection with the merits of this action. The Arkansas Supreme Court has held that "neither the trial court nor the appellate court may delve into the merits of the underlying claim when determining whether the requirements of Rule 23 have been satisfied." *Mega Life & Health Ins. Co. v. Jacola*, 330 Ark. 261, 267, 954 S.W.2d 898, 900 (1997). *See also Farm Bureau Mut. Ins. Co. v. Farm Bureau Policy Holders*, 323 Ark. 706, 710, 918 S.W.2d 129, 130-31 (1996) (holding that "an order denying or granting class certification is separate from the merits of the case") (citing and specifically adopting the reasoning of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)). As explained by the United States Supreme Court: "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen*, 417 U.S. at 177.

The evaluation of a motion for class certification is "basically a procedural question" under Rule 23, and a trial court does not have authority to conduct a preliminary inquiry into the merits of the lawsuit in order to determine whether it may be maintained as a class action. *Farm Bureau*, 323 Ark. at 709-10, 918 S.W.2d at 130-31. *See also* Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 7.09 at 7-35 (3d ed. 1992); *Barker v. FSC Securities Corp.*, 133 F.R.D. 548, 552 (W.D. Ark. 1989) (stating that the "consideration of reliance in securities fraud cases on class certification would

be an improper intrusion into the merits of the case"); *Summons v. Missouri Pac. R.R.*, 306 Ark. 116, 129, 813 S.W.2d 240, 247 (1991) (holding that the question of liability on the merits is not before the court at the class certification stage).

Whether or not Defendants engaged in the unlawful activities alleged by Plaintiffs is a matter of fact to be resolved by the finder of fact at trial. *Fox v. Equimark Corp.*, Fed. Sec. L. Rep. (CCH) ¶ 98,384 at 90,627 (W.D. Pa. 1994) (*citing Steiner v. Equimark*, 96 F.R.D. 603, 609 (W.D. Pa. 1983)). Furthermore, since an inquiry into the merits is prohibited, this Court will not reach or resolve any questions connected with the substantive defenses asserted by Defendants. *In re Revco Sec. Litig.*, 142 F.R.D. 659, 663 (N.D. Ohio 1992); *Luyando v. Bowen*, 124 F.R.D. 52, 56 (S.D.N.Y. 1989).

Defendants, in connection with their oral arguments against class certification, filed as exhibits numerous documents that had been attached to Defendants' pleadings served upon Plaintiffs as a part of the required 21-day notice under Rule 11 of the Arkansas Rules of Civil Procedure. The Rule 11 exhibits were never filed pursuant to Rule 11 but were filed as a part of Defendants' oral arguments. Defendants failed to identify how any of these exhibits relate to the class certification elements of Rule 23. After an analysis of the exhibits, the Court has determined that these exhibits go to the merits of Defendants' alleged defenses and not to whether Plaintiffs have established the six class certification requirements of Rule 23. In addition, Defendants presented the testimony of Defendant Wayne Ahart, Chairman of the Board of Defendant BNL Equity Corporation. Mr. Ahart's testimony primarily related to the lack of complaints received by Defendants from other shareholders regarding Defendants' public offering of shares in United Arkansas Corporation. Thus, such testimony also goes to the merits of Plaintiffs'

allegations and not to whether the six requirements of class certification under Rule 23 have been satisfied.

III.

THE LAW OF CLASS ACTIONS IN ARKANSAS

Rule 23 of the Arkansas Rules of Civil Procedure governs the certification of lawsuits as class actions. Rule 23 was amended to its present version by per curiam order in 1990. *In re Changes to the Arkansas Rules of Civil Procedure*, 304 Ark. 733 (1990). Today, subsection (a) of Rule 23 is identical to Rule 23(a) of the Federal Rules of Civil Procedure. *See* David Newbern, *Arkansas Civil Practice and Procedure* § 5-8 at 53 (2d ed. 1993).

The identical language of Ark. R. Civ. P. 23(a) and Fed. R. Civ. P. 23(a) is significant because the substantial body of federal case law regarding class actions can provide guidance to the Arkansas courts. The Arkansas Supreme Court has stated that it "will interpret Ark. R. Civ. P. 23 in the sane manner the federal courts interpret the comparable Fed. R. Civ. P. 23." *Farm Bureau*, 323 Ark. at 709, 918 S.W.2d at 130 (*citing Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992)).

Before a class action may be maintained, the requirements of both Rule 23(a) and 23(b) must be satisfied. Each of these requirements will be discussed separately below.

A. THE REQUIREMENTS OF RULE 23(a)

Rule 23(a) establishes four prerequisites to class certification. One or more members of a class may sue as representative parties on behalf of a class if:

(1) the class is so *numerous* that joinder of all members is impracticable,

(2) there are questions of law or fact *common* to the class,

(3) the claims of the representative parties are *typical* of the claims of the class, and

(4) the representative parties will fairly and *adequately* protect the interests of the class.

Ark. R. Civ. P. 23(a); *Cheqnet Systems. Inc. v. Montgomery*, 322 Ark. 742, 748, 911 S.W.2d 956, 958 (1995). The Rule 23(a) class inquiries (numerosity, commonality, typicality, and adequacy of representation) constitute a multipart analysis aimed at safeguarding the due process rights of absent class members. Thus, the ultimate focus of the court is directed to the appropriateness of the class device to assert and vindicate class interests.

1. Numerosity

For a class action to be appropriate, the proposed class must be so numerous that joinder of all members is impracticable. Ark R. Civ. P. 23(a)(1). The impracticability requirement of Rule 23(a)(1) does not mean that joinder of the absent class members would be impossible. Rather, the representative plaintiffs need only show that, because of numerous class members, joinder would be quite difficult or inconvenient. Charles A. Wright, *et al.*, 7A *Federal Practice and Procedure: Civil 2d* § 1762 at 159 (2d ed. 1986).

Whether Rule 23(a)(1) has been satisfied is a factual test. *Id.* § 1762 at 195. At least three interrelated factors are involved in the numerosity test: (1) the number of class members, (2) the inexpediency of their joinder, and (3) the inconvenience of trying individual lawsuits. *Id.* § 1762 at 192. Not surprisingly, the most obvious consideration is the size of the class itself. *Id.* § 1762 at 160. *See also Paxtor v. Union National Bank*, 688 F.2d 552 (8th Cir.), *cert. denied*, 460 U.S. 1083 (1982); *Armstead v. Pingree*, 629 F. Supp. 273 (D.C. Fla. 1986); 69 Am. Jur. 2d, *Securities Regulation—Federal* § 1010 (1993).

The Arkansas Supreme Court has not articulated a bright-line rule regarding the minimum number of class members necessary to satisfy the numerosity requirement, *Mega Life*, 330 Ark. at 270, 954 S.W.2d at 901, and probably will not since the court has held that under Rule 23 "the trial judge has broad discretion in matters of class certification." *Cheqnet Systems*, 322 Ark. at 748, 911 S.W.2d at 958 (*quoting Union National Bank v. Barnhart*, 308 Ark. 190, 197, 823 S.W.2d 878, 881 (1992)).

While the named plaintiffs' allegations regarding numerosity may not be based upon unwarranted speculation, "[t]he exact size of the proposed class and the identity of the class members need not be established for the court to certify a class, and the numerosity requirement may be supported by common sense." *Cheqnet Systems*, 322 Ark. at 748, 911 S.W.2d at 959 (*quoting Brewer v Friedman*, 152 F.R.D. 142, 143 (N. D. Ill. 1993)). *See also Evans v United States Pipe & Foundry*, 696 F.2d 925, 930 (11th Cir. 1983) (stating that a plaintiff need not show the exact number in the class, and when a question is a close one, it is better to certify the class); *Gentry v. C & D Oil Co.*, 102 F.R.D. 490, 492 (W.D. Ark. 1984). In *Mega Life*, the Arkansas Supreme Court upheld class certification based upon 400 class members. *Mega Life*, 330 Ark. at 270, 954 S.W.2d at 901-02.

2. Commonality

The second requirement under Rule 23(a) is that class members have questions of law or fact in common. Ark. R. Civ. P. 23(a)(2); *Cheqnet Systems*, 322 Ark. at 748, 911 S.W.2d at 959. The requirement of commonality is usually met in securities fraud actions if similar or identical misrepresentations are made to a large number of investors. 69A Am. Jur. 2d, *Securities Regulation-Federal* § 1013 at 133 (1993) (citing numerous cases). "A court will normally find commonality where a question of law refers to

standardized conduct by defendants towards members of the proposed class." *In re Amerifirst Sec. Litig.*, 139 F.R.D. 423, 428 (S.D. Fla. 1991). "Classic securities fraud cases involving a class of purchasers allegedly defrauded over a period of time by similar misrepresentations satisfy the common question." *In re Alco Int'l Group, Inc. Sec. Litig.*, 158 F.R.D. 152 (S.D. Cal. 1994) (*citing Blackie v. Barrack*, 524 F.2d. 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976)). *See also Barker v. FSC Sec. Corp.*, 133 F.R.D. 548, 552 (W.D. Ark. 1989); 69A Am. Jur. 2d, *Securities Regulation – Federal* § 22.15 (1993).

Rule 23(a)(2) "does not require that all questions of law and fact raised by the dispute be common" to each member of the class. 7A *Federal Practice and Procedure: Civil 2d*, *supra*, § 1763 at 196; *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986). Rather, "the issue turns on whether there exists at least one issue affecting all or a significant number of proposed class members." *Kreuzfeld A.G. v. Carnehammer*, 138 F.R.D. 594, 599 (S.D. Fla. 1991) (*citing Steward v. Winter*, 669 F.2d 328 (5th Cir. 1982)). Because the requirement of commonality may be satisfied by a single common issue, it is easily met. *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994).

3. Typicality

The third prerequisite of Rule 23(a) requires a proposed class representative to show that "the claims . . . of the representative parties are typical of the claims . . . of the class." Ark. R. Civ. P. 23(a)(3). Rule 23(a)(3) assures that the claims of the representative party are *similar enough* to the claims of the class so that he or she will properly represent the class. *Wright v. Stone Container Corp.*, 524 F.2d 1058 (8th Cir. 1975). *See generally* 7A *Federal Practice and Procedure: Civil 2d*, *supra*, § 1764 at 232-33. While

requiring somewhat different inquiries, the United States Supreme Court has noted that the "commonality and typicality requirements of Rule 23(a) tend to merge." *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

The Arkansas Supreme Court has explained the requirement of typicality in numerous cases, most recently in the *Mega Life* case. In *Mega Life*, the court explained as follows:

> Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. In other words, when such a relationship is shown, a plaintiff's injury arises from or is directly related to a wrong to a class, and that wrong includes the wrong to the plaintiff. Thus, a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, *the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.*

Mega Life, 330 Ark. at 274, 954 S.W.2d at 904 (emphasis added) (*quoting Direct Gen'l Ins. Co. v. Lane*, 328 Ark. 476, 944 S.W.2d 528 (1997) and Newberg & Conte, supra, § 3.13, at 166-67 (2d ed. 1985)).

As explained by the court in *In re Amerifirst Sec. Litig.*, 139 F. R. D. 424, 432 (S.D. Fla. 1991): "As long as Plaintiffs assert, as they do here, that Defendants committed the same wrongful acts in the same manner against all members of the class, they established the necessary typicality." From this discussion, it is evident that to a large extent "[i]t is the

defendant's course of conduct . . . upon which the court must focus in determining typicality." *In re IGI Sec. Litig.*, 122 F.R.D. 451, 456 (D.N.J. 1988) (emphasis in original).

Like the federal courts, the Arkansas Supreme Court, in its analysis of Rule 23(a)(3)'s typicality requirement, directs its scrutiny upon the defendant's alleged behavior. For instance, in *Cheqnet Systems*, the court stated as follows:

> [The named plaintiff's] injuries and damages arise from the *same wrong* allegedly committed against the class—the collection or attempt to collect for dishonored checks in violation of Arkansas statutory law. The fact that the injuries and damages suffered as a result of *the alleged wrongdoing may vary* among class members does not make this action fail the typicality requirement.

Cheqnet Systems, 322 Ark. at 749, 911 S.W.2d at 959 (emphasis added). Similarly, in *Mega Life*, the court held that:

> [t]hus, when analyzing this factor, *we focus upon the defendants' conduct and not the injuries or damages suffered by the plaintiffs.*

Mega Life, 330 Ark. at 274-75, 954 S.W.2d at 904 (emphasis added) (citation omitted).

4. Adequacy of Representation

Rule 23(a)(4) provides that representative parties may bring an action on behalf of all class members if "the representative parties will fairly and adequately protect the interests of the class." Ark. R. Civ. P. 23(a)(4). The Arkansas Supreme Court has stated that the three elements of the "adequacy of representation" requirement are as follows:

> (1) the representative counsel must be qualified, experienced and generally able to conduct the litigation; (2) that there be no evidence of collusion or conflicting

> interest between the representative and the class; and (3) the representative must display some minimal level of interest in the action, familiarity with the practices challenged, and ability to assist in decision making as to the conduct of the litigation.

Mega Life, 330 Ark. at 275, 954 S.W.2d at 904 (*quoting Direct General, supra*).

The test announced by the Arkansas Supreme Court in *Mega Life* follows established precedent under Fed. R. Civ. P. 23(a)(4). As is evident, two lines of inquiry are necessary under the "adequacy" test; the first prong considers the representative party and the second prong of inquiry considers class counsel. *Id. See also* Newberg & Conte, *supra*, § 11.28 at 11-58 (3d ed. 1992); *In re GMC Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995), *cert. denied*, 516 U. S. 824 (1998); *Kirkpatrick v. J. C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). Both inquiries are intended to assure that the absent class members' interests are fully pursued. *Id.*

The Arkansas Supreme Court has held that the element of class representative adequacy "is satisfied if the representative displays a *minimal* level of interest in the action, a familiarity with the challenged practices, and the ability to assist in litigation decisions." *Mega Life*, 330 Ark. at 276, 954 S.W.2d at 904 (emphasis added) (*citing Direct General, supra*; *Cheqnet Systems, supra.*). The scrutiny of the class representative is not intense. A class representative is merely required to have a general understanding of the nature of the action and of the alleged wrongdoing perpetuated against him by the defendant. *Kirkpatrick v. J. C. Bradford & Co.*, 827 F.2d 718 (11th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). The second prong of the adequacy inquiry is the evaluation of the adequacy of class counsel. Absent a showing to the contrary, a court will presume that a representative's attorney

will vigorously and competently pursue the litigation. *Mega Life*, 330 Ark. at 275, 954 S.W.2d at 959 (*citing* Newberg & Conte, *supra*, §§ 3.24 & 3.42 (3d ed. 1992)). There are two relevant inquiries involved in the analysis of counsel: (1) whether class counsel possesses adequate experience; and (2) whether class counsel will vigorously prosecute the action. *First National Bank v. Mercantile Bank*, 304 Ark. 196, 801 S.W.2d 38 (1990).

B. THE REQUIREMENTS OF RULE 23(b)

Before a class action may be maintained, the requirements of Rule 23(b) must be satisfied in addition to the four prerequisites of Rule 23(a). *See* Ark. R. Civ. P. 23(b). In order for an action to be certified as a class action, Rule 23(b) requires the court to determine: (1) whether questions of law or fact common to the members of the class *predominate* over any questions affecting only individually members; and (2) whether the class action is *superior* to other available methods for the fair and efficient adjudication of the controversy. *Id.* The questions of predominance of common issues and superiority are "very much related to the broad discretion conferred on a trial court faced with them." *Cheqnet Systems*, 322 Ark. at 750, 911 S.W.2d at 960 (*quoting Summons*, 306 Ark. at 123, 813 S.W.2d at 243).

1. Common Questions of Law or Fact Must Predominate Over Individual Questions

Rule 23(b) requires that common questions of law or fact predominate before a court may certify a dispute as a class action. Ark. R. Civ. P. 23(b). Commonality under Rule 23(b) (as well as under subsection (a)(2) of Rule 23) is established if all members of the class are in a substantially similar factual situation and the questions of law raised by the plaintiffs are applicable to each class member. *In re Prudential Sec. Ltd. Partnership Litig.*, Fed. Sec. L. Rep.

(CCH) ¶ 98,915 at 93,414 (S.D.N.Y. 1995). Courts generally focus on the liability issue, as alleged, in deciding whether the predominance requirement is met, and if the liability issue is common for the class and against the defendant, common questions are held to predominate over individual questions. *Id.* (*quoting Dura-Bilt Corp. v. Chase Manhattan Corp.*, 89 F. R. D. 87, 93 (S.D.N.Y. 1981)).

A finding that common questions predominate ensures that the claims of the class members will be sufficiently similar so that adjudication by representation will be appropriate. 7A *Federal Practice and Procedure: Civil 2d*, *supra*, § 1777 at 518. The "predominance" test involves a judicial balancing between the value of allowing individual actions by each class member and the economy that can be achieved by allowing a multiple party dispute to be resolved on a class action basis. *Id.* § 1777 at 519. The Arkansas Supreme Court has specifically acknowledged that all law and fact questions need not be resolved in order for a trial court to properly order class certification. *Summons*, 306 Ark. at 224, 813 S.W.2d at 244. Moreover, in *Mega Life*, the court admonished "that predominance may not be determined by comparing the mere number of individual versus common claims." *Mega Life*, 330 Ark. at 273, 954 S.W.2d at 903. In addition, the court emphasized that, even if certain individual issues existed, "[b]y limiting the issue to be tried in a representative fashion to the one that is common to all, the trial court can achieve real efficiency." *Id.* at 272, 954 S.W.2d at 902.

2. A Class Action Must Be Superior to Other Available Methods for the Fair and Efficient Adjudication of the Action

The final requirement for class certification is that the Court must find that a class action "is superior to other available methods for the fair and efficient adjudication of the controversy." Ark. R Civ. P. 23(b). Courts have frequently endorsed the use of class procedures in resolving claims under the federal and state securities laws. *See Basic, Inc. v. Levinson*, 485 U.S. 224 (1988); *Seidman v. American Mobile Systems, Inc.*, 157 F.R.D. 354 (E.D. Pa. 1994) (*citing Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir.), *cert. denied sub nom., Wasserstrom v. Eisenberg*, 474 U.S. 946 (1985)); *Wade v. Industrial Funding Corp.*, Fed. Sec. L. Rep. (CCH) ¶ 98,023 at 98,023 (N.D. Cal. 1993); *Knapp v. Gomez*, Fed. Sec. L. Rep. (CCH) ¶ 96,166 at 90,921 (S.D. Cal. 1991).

As the United States Supreme Court has recognized: "[c]lass actions. . . permit the plaintiffs to pool claims which would be uneconomical to litigate individually . . . . [m]ost of the plaintiffs would have no realistic day in court if a class action were not available." *Phillips Petroleum v. Shutts*, 472 U.S. 797, 809 (1985). The Arkansas Supreme Court has also recognized the importance of protecting legitimate claims through the class action device, stating:

> Would it be fair to the class members to require them to sue individually? The evidence so far shows that each putative class member has a claim that is too small to permit pursuing it economically. If they cannot sue as a class, the chances are they will not sue at all.

International Union of Elec. Radio & Mach. Workers v. Hudson, 295 Ark. 107, 118, 747 S.W.2d 81, 87 (1988). The Arkansas Supreme Court further explained the necessary analysis under Rule 23(b) in *Lemarco, Inc. v. Wood*, 305 Ark. 1, 804 S.W.2d 724 (1991) where the court stated:

> Finally, pursuing this case as a class action is fair to both sides. [The defendant] can offer evidence concerning its sales training, solicitation mailings, sales presentations, installation contracts, and its intentions regarding all of them . . . . A class approach is also fair to the class members in that they probably would not sue if they could not do so as a class since it would not be economically feasible to do so.

Id. at 4, 804 S.W.2d at 726.

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After hearing arguments from counsel for the parties and a thorough review of the record, including all of the pleadings filed in this matter and the exhibits attached thereto, as well as the evidence and arguments submitted in connection with the class certification hearing, the Court makes the following findings of fact and conclusions of law.

A. NUMEROSITY

It is undisputed that Defendants (hereinafter occasionally referred to collectively as "**UAC**") sold stock to Plaintiffs and the putative class members beginning on May 1, 1989 and ending May 1, 1991 (the "**First Offering**"), and from May 1, 1991 to May 1, 1992 (the "**Second Offering**"). UAC First Offering Prospectus, p. 1 and UAC Second Offering Prospectus, p. 2.

It is undisputed that approximately 1,841 Arkansas residents purchased stock in UAC during UAC's First and Second Offerings. Defendants' Answer to Plaintiffs' Second Amended Class Action Complaint at ¶ 29. Therefore, the numerosity requirement of Rule 23(a)(1) of the Arkansas Rules of Civil Procedure is easily satisfied. See *Mega Life*,

330 Ark. at 270, 954 S.W.2d at 901 (affirming trial court's ruling that a class composed of over 400 Arkansas residents satisfied the numerosity requirement).

Defendants assert that there are only 590 UAC shareholders that could be affected by this lawsuit because the statute of limitations bars an action relating to purchases prior to April 30, 1991. Defendants' statute of limitations defense, however, goes to the merits of this action and is, therefore, not an issue that should be addressed by the Court at this time. *Direct Gen'l Ins. Co.*, 328 Ark. at 485, 944 S.W.2d at 532 ("we stress the inappropriateness of contesting class certification by raising merits-based arguments"). Moreover, even assuming the Defendants' argument on the statute of limitations was correct, 590 shareholders easily would be sufficient to satisfy the numerosity requirement under Arkansas law. Furthermore, the First Offering Prospectus made it clear that UAC, in its sole discretion, could terminate the First Offering at any time prior to May 1, 1991. Therefore, the UAC shareholders' offers to purchase securities from UAC in the First Offering were not accepted and, therefore, not a contract enforceable against UAC, until May 1, 1991. First Offering Prospectus at p. 16. Accordingly, this is the earliest possible date upon which the statute of limitations began to run.

B. COMMONALITY

The second requirement of Rule 23(a), commonality, is satisfied by Plaintiffs as well. Plaintiffs' allegation that the UAC securities were offered and sold in violation of the Arkansas Securities Act, specifically Ark. Code Ann. § 23-42-106 (Supp. 1997), is common to all putative class members. This common question of law is uniform in that it is undisputed that the First Offering Prospectus and the Second Offering Prospectus were utilized in selling the UAC securities to Plaintiffs and to the putative class members. In

fact, the Subscription Agreement attached to both the First Offering Prospectus and the Second Offering Prospectus required that the purchaser of stock sign a statement that he or she had received a copy of the respective prospectus. First Offering Prospectus—Subscription Agreement; Second Offering Prospectus—Subscription Agreement.

Plaintiffs offered evidence at the class certification hearing that the First Offering Prospectus and the Second Offering Prospectus contained, respectively, 54 and 44 almost identical representations that UAC was being formed primarily to sell life insurance. *See* Plaintiffs' Exhibit 1—Tab 3A and 3B. Furthermore, Plaintiffs presented evidence to the Court at the class certification hearing that the sales agents of UAC used a Scripted Sales Presentation containing many of the same representations. In addition, Plaintiffs allege that the First Offering Prospectus, the Second Offering Prospectus, and the Scripted Sales Presentation all contained the following common alleged material misrepresentations or omissions of material fact:

1. Defendants misrepresented that UAC and its subsidiary would hire and license captive sales agents and that the captive sales force would use a one-on-one sales method utilizing personal visits by agents to homes and businesses to sell its life insurance products.

2. Defendants failed to disclose that UAC had determined, instead, to shift its focus to the sale of dental insurance through insurance brokers utilizing a mass marketing technique.

3. Defendants misrepresented that the President of UAC, Defendant Kenneth Tobey, had nine and/or ten-years' experience in the life insurance business and failed to disclose Defendant Tobey's actual lack of experience in the life insurance business.

4. Defendants misrepresented that Defendants Ahart, Shamas, and Tobey had built four successful insurance companies and failed to disclose that such companies were unsuccessful investments for the shareholders who invested in the companies.

5. Defendants misrepresented that there were no then-existing opportunities known to UAC or its management to purchase any existing life insurance company or other business and failed to disclose the existence of the opportunity to purchase Statesman Life Insurance Company.

6. Defendants misrepresented that Defendant Tobey would serve as the President of UAC and failed to disclose that Defendant Tobey would be serving as the President of UAC in name only and that he would not function as the actual President of UAC, as the term "president" is defined under the law and understood in the business world.

See Plaintiffs' Third Amended Class Action Complaint at ¶¶ 26 and 27.

As additional support that these allegations are common among Plaintiffs and the putative class members, Plaintiffs offered the Affidavits of Myra Jo Pearson, Paul Pearson, and James Stilwell, the Plaintiffs, and of Wayne Bennett, who, according to his Affidavit, is an advisory board member of UAC. *See* Affidavits of Myra Jo Pearson, Paul Pearson, James Stilwell, and Wayne Bennett in support of Plaintiffs' Motion for Class Certification. Defendants failed to offer any testimony or evidence to refute Plaintiffs' allegations that there are questions of fact or law common to Plaintiffs and the class. Thus, the Court finds that the commonality requirement of Ark. R. Civ. P. 23(a)(2) is satisfied. *See Mega Life*, 330 Ark. at 271, 954 S.W.2d at 902.

C. TYPICALITY

As noted earlier, the Arkansas Supreme Court has explained that a named plaintiff's claims are typical of other class members' claims if the claims arise from the same event or course of conduct or are based on the same legal theory. *See Direct Gen'l Ins. Co.*, 328 Ark. at 480-81, 944 S.W.2d at 529; *Cheqnet Systems*, 322 Ark. at 749, 911 S.W.2d at 959. In other words, "the typicality requirement is satisfied if the representative's claim arises from the same wrong allegedly committed against the members of the class." *Mega Life*, 330 Ark. at 274, 954 S.W.2d at 904. In analyzing this factor, it is the defendants' course of conduct that the Court must analyze. *Id.* at 274-75, 954 S.W.2d at 904.

In light of the foregoing, the Court concludes that the Plaintiffs' claims are typical of the claims of the putative class members. Plaintiffs have alleged that Defendants made certain misleading material misrepresentations or omissions of material facts through the use of the First Offering Prospectus, the Second Offering Prospectus, and the Scripted Sales Presentation, all in violation of the Arkansas Securities Act. The claims asserted by Plaintiffs are identical to the claims of the putative class members. At the class certification hearing, Defendants failed to submit any evidence to the Court that Plaintiffs' claims are not typical of the class. Defendants did, however, offer the testimony of Defendant Ahart, Chairman of the Board of UAC, to the effect that UAC had not received any complaints from any shareholders prior to the filing of this lawsuit. Any such evidence goes to the merits of Defendants' alleged defenses and will not be considered by the Court. Moreover, Defendant Ahart's testimony does not address the issue of whether Plaintiffs' claims are typical of the putative class members. Accordingly, the Court finds that the typicality requirement of Ark. R. Civ. P. 23(a)(3) is satisfied.

D. FAIR AND ADEQUATE REPRESENTATION

In support of their Motion for Class Certification, Plaintiffs offered their Affidavits, which supported the allegations made in the Third Amended Class Action Complaint. Each such Affidavit contained the following statement:

> I think I am qualified to represent all members of the class who purchased UAC securities in the First Public Offering or the Second Public Offering of UAC. All such class members purchased securities based upon misrepresentations or material omissions that constitute misrepresentations in the sale of the above-described securities. I am available to attend depositions, hearings, and a trial. I will assist my attorneys in any manner that I can, including but not limited to, providing documents requested by either my attorneys or the defendants, reviewing answers to interrogatories, providing background and historical information and providing input into decisions as needed by my attorney. I will perform my duties and responsibilities as a class representative to the best of my ability.

The Court also notes that the class representatives were present at the class certification hearing. Furthermore, the Plaintiffs offered the Affidavits of H. William Allen and Thomas A. Mars concerning the adequacy of class counsel to represent Plaintiffs and the putative class members. Once again, Defendants failed to offer any affidavits, testimony, or other evidence that Plaintiffs or class counsel could not fairly and adequately protect the interests of the class. Absent a showing to the contrary, the Court "may presume that the representative's attorney will vigorously and competently pursue the litigation." *Mega Life*, 330 Ark. at 275, 954 S.W.2d at 904. Moreover, the Court finds that the named Plaintiffs in this case have displayed a "minimal level of interest in the action, a familiarity with the challenged practices, and the ability to assist in litigation decisions." *See*

id. at 276, 954 S.W.2d at 904. Additionally, there is no evidence before the Court that Plaintiffs have a conflict of interest with the putative class members. *See id.* at 275, 954 S.W.2d at 904. Consequently, the Court concludes that the adequacy requirement of Ark. R. Civ. P. 23(a)(4) is satisfied.

E. PREDOMINANCE

The predominance requirement of Rule 23(b) only requires that common issues predominate, and it does not require the absence of individual issues. *See Summons*, 306 Ark. at 224, 813 S.W.2d at 244. The "predominance test" does not contemplate resolution of all questions of law or fact or that all questions of law or fact must be common to all putative class members. *Id.* Rather, the operative word in the test is the word "predominate." This means that common questions of law or fact must be the "stronger or leading element" or be "preponderant" as compared to individual issues. *Webster's Encyclopedic Unabridged Dictionary of the English Language* at 1523 (1996 edition).

Plaintiffs' allegations primarily focus on Defendants' untrue statements, misrepresentations, and material omissions relating to the offer and sale of the shares of UAC during the First Offering and Second Offering of those securities. As previously observed by the Court, Plaintiffs' claims and the claims of the putative class members are identical because they all evolve from or are derived from the same written material—the First Offering Prospectus, the Second Offering Prospectus, and the Scripted Sales Presentation. Defendants offered no evidence at the class certification hearing that these common issues do not predominate over any individual issues. As such, the Court concludes that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members of the class and that the predominance requirement of Ark. R. Civ. P. 23(b) is satisfied.

F. SUPERIORITY TO OTHER METHODS OF ADJUDICATION

In this case, it is undisputed that there were over 1,800 investors in UAC securities during the First Offering and Second Offering and that all such investors are potential putative class members. Moreover, the Court notes the relatively small size of the claims of the potential putative class members. If this action were not maintained as a class action, in all likelihood the putative class members would never have a meaningful day in court.

In addition, certifying this case as a class action will be fair to both sides because it will be more economical for Plaintiffs and the putative class members to pursue this lawsuit as a class rather than individually, and Defendants still will be able to pursue their individual defenses, such as the statute of limitations. See *Mega Life*, 330 Ark. at 274, 954 S.W.2d at 903. Based upon the foregoing, the Court concludes that the superiority requirement of Ark. R. Civ P. 23 (b) is satisfied.

V.

THE ORDER

Based upon the foregoing findings of fact and conclusions of law, the Court hereby rules that the requirements of Ark. R. Civ. P. 23(a) and 23(b) are satisfied, and further, that this action should be, and is hereby, certified as a class action. IT IS, THEREFORE, ORDERED that Plaintiffs' Motion for Class Certification should be, and is hereby, GRANTED.

IT IS FURTHER ORDERED that the class shall consist of all of those investors who were solicited to purchase shares of UAC in the First Offering and Second Offering and who, in fact, did purchase shares of UAC securities during the public offerings.

IT IS FURTHER ORDERED that discovery and notice to class members shall proceed in this action, regardless of whether any party appeals from this Order Granting Motion for Class Certification.

IT IS FURTHER ORDERED that Defendants shall not communicate or attempt to settle with the absent class members without prior written approval from this Court.

IT IS FURTHER ORDERED that Plaintiffs shall prepare a Notice of Class Certification to be used to notify the absent class members of the Court's decision concerning class certification and that such Notice will be submitted to the Court for its approval within twenty-one (21) days of the date of this Order.

IT IS SO ORDERED this 26th day of August1998.

/s/ John Ward
HONORABLE JOHN WARD
Pulaski County Circuit Judge

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS, THIRD DIVISION

NO. 96-4971

MYRA JO PEARSON AND PAUL PEARSON
Plaintiffs

VS.

BNL EQUITY CORPORATION (formerly known as UNITED ARKANSAS CORPORATION), BNL FINANCIAL CORPORATION (formerly known as UNITED IOWA CORPORATION), and WAYNE E. AHART, KENNETH TOBEY and BARRY N. SHAMAS,
Defendants

CAPTION

BE IT KNOWN, that on the 6th day of June, 1998, this cause of action came on for hearing before the Honorable John Ward, Circuit Judge, Third Division Circuit Court of Pulaski County, Arkansas, sitting as a jury, with counsel appearing, as follows:

APPEARANCES:

FOR THE PLAINTIFFS

HONORABLE JAMES PENDER
HONORABLE MICHEL PTAK
Attorneys at Law
425 West Capitol
Little Rock, AR 72201

HONORABLE JOHN TULL
HONORABLE KATHERINE CLOUD
Attorneys at Law
111 Center Street
Little Rock, AR 72201

FOR THE DEFENDANTS

HONORABLE LARRY BURKS
HONORABLE JEFF MOORE
Attorneys at Law
400 West Capitol
Little Rock, AR 72201

THE COURT: This is a hearing on a motion for class certification. The court reporter has asked that you identify yourself as we start here so we can know who you are and who you're representing.

MR. TULL: John Tull and Katherine Cloud of Williams and Anderson and Jim Pender and Michael Ptak of Pender and McCastlain law firm.

THE COURT: Thank you.

MR. BURKS: Larry Burks and Jeff Moore for all of the defendants, and Mr. Wayne Ahart and Mr. Kenny Tobey are also present.

THE COURT: Let's see, Mr. Tull, are you going to take the ball here?

MR. TULL: I'll take it initially, your Honor. Let me tell the Court what our plan of procedure is and outline what we propose on doing concerning our motion for class certification. Mr. Pender will address the factual issues underlying our claim, why this class should be certified and then Ms. Cloud will address the legal arguments, and I will go back and clean up, and hopefully the Court won't have to hear from me very often today,

THE COURT: Do we intend to have some testimony or are we going to have depositions or how do you want to do it?

MR. TULL: We don't anticipate, your Honor, we believe this is a procedural matter and we've already filed our

affidavits and pertinent portions of the depositions are on file and Mr. Pender has a presentation that's going to go over that, but we don't anticipate, at this time, calling any witnesses.

MR. BURKS: We may have a witness since the plaintiffs are here. Are we going to have opening comments?

THE COURT: Very well. Let me tell you where I'm coming from, I have made a note back sometime ago, back in '97, that said "This case has everything you need to know about class certification," and it is Judge Imber's decision in the MegaLife case, it's just kind of an outline that I have used in these types of hearings. Normally, we don't really need any oral testimony, but we don't want to foreclose attorneys from doing that if they feel they need to.

REPORTER'S CERTIFICATE

STATE OF ARKANSAS -)
) SS
COUNTY OF PULASKI)

I, NINA S. FLACK, Official Court Reporter for the Third Division Circuit Court of Pulaski County, Arkansas, do hereby certify that the foregoing is a complete transcript of said hearing, and is true and accurate to my best knowledge and belief;

And, that all exhibits introduced in said hearing are attached to the Original Transcript.

WITNESS my hand and seal on this 14th day of September, 1998.

/s/ Nina S. Flack
NINA S. FLACK
Certified Court Reporter #51

The cost of this transcript is $198.40

CLERK'S CERTIFICATE

STATE OF ARKANSAS)
) SS
COUNTY OF PULASKI)

I, CAROLYN STALEY, CLERK OF THE CIRCUIT COURT WITHIN AND FOR THE STATE AND COUNTY AFORESAID, DO HEREBY CERTIFY THAT THE FOREGOING PAGES CONTAIN A TRUE, CORRECT, AND COMPARED COPY OF THE RECORD IN THE ACTION STYLED:

CV 96-4971

MYRA JO PEARSON
PAUL PEARSON

VS.

BNL EQUITY CORPORATION ET AL

AS THE SAME APPEARS ON FILE AND OF RECORD IN MY OFFICE IN TESTIMONY WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL AS SUCH CLERK ON THIS 19TH DAY OF JANUARY, 1999.

CAROLYN STALEY, Circuit Clerk

BY: /s/ [illegible] D.C.

FEE BILL:

CLERK: $111.00

SHERIFF:

REPORTER:

TRANSCRIPT:

ARKANSAS SUPREME COURT
Proceedings of March 16, 2000
Per Curiam Orders

Rehearings denied:

Petitions for rehearing were denied today in the following cases.

99-78. BNL Equity Corporation et al. v. Myra Jo Pearson, from Pulaski Circuit, Third Division. Thornton, J., would grant. Smith, J., not participating.

IN THE
SUPREME COURT OF ARKANSAS

CASE NO. 99-78

BNL EQUITY CORPORATION (formerly known as UNITED ARKANSAS CORPORATION), BNL FINANCIAL CORPORATION (formerly known as UNITED IOWA CORPORATION), and WAYNE E. AHART, KENNETH TOBEY and BARRY N. SHAMAS,
Appellants

VS.

MYRA JO PEARSON AND PAUL PEARSON
Appellees

MOTION FOR STAY OF MANDATE AND MEMORANDUM OF AUTHORITIES

COME NOW the Appellants and for this their Motion for Stay of Mandate, state and show:

1. This is an appeal of a class certification order from Pulaski County Circuit Court.

2. As part oftheir Appeal, Appellants raised the United States constitutional issues of due process, including jury trial rights, and equal protection of the laws.

3. On February 10, 2000, the Arkansas Supreme Court issued its opinion ("Opinion") affirming the Trial Court's class certification order.

4. On February 28, 2000, Appellants filed their Petition for Rehearing again raising the issues of due process and equal protection of the laws under the United States Constitution and arguing that the Opinion violated Appellants' rights under the United States Constitution.

5. The Appellants desire to prosecute these proceedings to the United States Supreme Court by Petition for Certiorari.

6. The Appellants have placed an order with the Clerk for a copy of the record and made the advance deposit of fifty dollars ($50.00).

7. The issues under the United States Constitution raised in this Appeal and which will be the subject of Appellants' Petition for Certiorari are important the United States Supreme Court and will effect whether or not the Appellants receive a fair trial. The Opinion conflicts with decisions of United States Courts of Appeal and the United States Supreme Court. See *Boddie v. Connecticut*, 401 U.S. 371 (1971); *General Telephone Company v. Falcon*, 457 U.S. 147 (1982); *Amchem Products v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.* , _____ U.S. _____, 1999 WL 412604 (June 23, 1999); *Castano v. American Tobacco Co.*, 84 F. 3d 734 (5th Cir. 1996); *In re Rhone-Poulec Rorer. Inc.*, 51 F. 3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995).

8. Appellants' Petition for Certiorari will be important in the development of jurisprudence in Arkansas.

9. The time required to proceed with Petition for Certiorari from the United States Supreme Court will not prejudice Appellees.

10. In addition to the foregoing authorities see Rule 5-3, Mandate, Rules of Arkansas Supreme Court; Rule 10, Rules of United States Supreme Court.

WHEREFORE, based on the foregoing, Appellants respectfully request that the Arkansas Supreme Court stay its Mandate for the purpose of permitting Appellants the opportunity to process a petition certiorari from the United States Supreme Court.

Respectfully submitted,

LARRY W. BURKS
FRIDAY, ELDRIDGE & CLARK
2000 Regions Center
400 West Capitol
Little Rock, Arkansas 72201
(501) 376-2011

/s/ Larry W. Burks
LARRY W. BURKS
State Bar No. 70012

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I, Larry W. Burks, do hereby certify that on this 7th day of March, 2000, a copy of the foregoing Motion was served by United States mail, first class, postage prepaid upon:

JAMES R. PENDER, ESQ.
PENDER, MCCASTLAIN & PTAK, P.A.
900 South Shackelford, Suite 750
Little Rock, Arkansas 72211

JOHN E. TULL, III, ESQ.
WILLIAMS & ANDERSON
111 Center Street, 22nd Floor
Little Rock, Arkansas 72201

HONORABLE JOHN WARD
401 West Markham, Suite 240
Little Rock, Arkansas 72201

/s/ Larry W. Burks
LARRY W. BURKS

LAW OR CHANCERY MANDATE

STATE OF ARKANSAS)
) SCT
IN THE SUPREME COURT)

BE IT REMEMBERED, That at a session of the Supreme Court of the State of Arkansas, begun and held in the City of Little Rock, on March 23, 2000, amongst others were the following proceedings, to-wit:

---

99 00078

BNL EQUITY CORPORATION ET AL.
Appellant(s)

VS.

MYRA JO PEARSON ET AL.
Appellee(s)

Appeal from Pulaski Circuit, Third Division—96-497

Appellants' motion for stay of mandate is granted.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case herein stated, I, Leslie W. Steen, Clerk of said Supreme Court, hereunto set my hand and affix the seal of said Supreme Court, at my office in the city of Little Rock, this 23rd day of March, 2000.

/s/ Leslie W. Steen
Clerk

By: D.C.

Original to Clerk
cc: Larry W. Burks
James R. Pender
John Earle Tull III
Hon. John Ward, Judge

SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARKANSAS RULES OF CIVIL PROCEDURE

Rule 23. Class actions.

(a) *Prerequisites to Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this section may be conditional and it may be altered or amended before the decision on the merits.

(c) *Notice.* In any class action in which monetary relief is sought, including actions for damages and restitution, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall: (1) describe the action and the members' rights in it; (2) advise each member that the court will exclude the member from the class if the member so requests by a specified date; (3) advise each member that the judgment, whether favorable or not, will include all members who do not request exclusion; and (4) state that any member who does not request exclusion may, if the member

desires, participate in the litigation, either in person or through counsel. The cost of such notice shall be borne by the representative parties; provided, however, that the court may shift all or part of such cost to the opposing party or parties if the case is settled or the class representative substantially prevails on the merits.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of the members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; and (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 and may be altered or amended from time to time as may be desirable.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court. In cases where the court has entered an order that an action shall be maintained as a class action, notice of such proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

ARKANSAS RULES OF APPELLATE PROCEDURE—CIVIL

Rule 2. Appealable matters; priority.

(a) An appeal may be taken from a circuit, chancery, or probate court to the Arkansas Supreme Court from:

9. An order granting or denying a motion to certify a case as a class action in accordance with Rule 23 of the Arkansas Rules of Civil Procedure.

Rule 5.3. Mandate.

(c) *Stay of Mandate.* Parties desiring to prosecute proceedings to the Supreme Court of the United States, either by appeal or certiorari, may obtain an order either staying the issuance of a mandate or recalling a mandate, upon motion to the Court (or to an individual judge) and a showing that an order has been placed with the Clerk for a copy of the record, with payment of an advance deposit of fifty dollars ($50.00). Such stay is discretionary.

Bond may be required as a condition for granting the stay.

SECURITIES GENERALLY

Ark. Code Ann. § 23-42-106. Civil liability.

(a)(1) Any person who commits the following acts is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six percent (6%) per year from the date of payment, costs, and reasonable attorney's fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security:

(A) Offers or sells a security in violation of § 23-42-301, § 23-42-212(b), § 23-42-501(1) or (2), or any rule or order under § 23-42-502 which requires the affirmative approval of sales literature before it is used, or in violation of any condition imposed under § 23-42-403(d), § 23-42-404(g), or § 23-42-404(i); or

(B) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.

(2) Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six percent (6%) per year from the date of disposition.

(b)(1) Any person who purchases a security in violation of §§ 23-42-301, 23-42-307, 23-42-507, and 23-42-508, or otherwise by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to

make the statements made, in light of the circumstances under which they are made, not misleading, the seller not knowing of the untruth or omission, and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, shall be liable to the person selling the security to him, who may sue either at law or in equity to recover either the security or the security plus any income or other distributions in cash or other property received directly or indirectly by the purchaser, upon tender of the consideration the seller received or for damages together with interest at six percent (6%) from the date of purchase plus costs and reasonable attorney's fees.

(2) Damages may be for out-of-pocket losses or for the benefit of the bargain.

(3) Notice of willingness to pay the amount specified in exchange for the security shall constitute valid tender pending acceptance thereof by the purchaser.

(c) Every person who controls a seller liable under subsection (a) of this section or a purchaser liable under subsection (b) of this section; every partner, officer, or director of such a seller or purchaser; every person occupying a similar status or performing a similar function; every employee of such a seller or purchaser who materially aids in the sale; and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with, and to the same extent as, the seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

(d) Any tender specified in this section may be made at any time before entry of judgment.

(e) Every cause of action under this section survives the death of any person who might have been a plaintiff or defendant.

(f) No person may sue under this section after three (3) years from the effective date of the contract of sale. No person may sue under this section:

(1) If the buyer received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at six percent (6%) per year from the date of payment less the amount of any income received on the security, and he failed to accept the offer within thirty (30) days of its receipt; or

(2) If the buyer received such an offer before suit and at a time when he did not own the security unless he rejected the offer in writing within thirty (30) days of its receipt.

(g) No person who has made or engaged in the performance of any contract in violation of any provision of this chapter or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

(2)

No. 99-2002

Supreme Court, U.S.
FILED
AUG 14 2000
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BNL EQUITY CORPORATION (formerly known as UNITED ARKANSAS CORPORATION), BNL FINANCIAL CORPORATION (formerly known as UNITED IOWA CORPORATION), WAYNE E. AHART, KENNETH TOBEY and BARRY N. SHAMAS,

Petitioners,

v.

MYRA JO PEARSON, PAUL PEARSON and JAMES STILWELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

Petitioners ask this Court for a writ of certiorari based on their claim that Arkansas Rule of Civil Procedure 23 violates constitutional due process because the Supreme Court of Arkansas' interpretation of Rule 23 does not employ the "rigorous analysis" approach discussed in *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982).

The writ should be denied because the issue sought to be reviewed does not present a compelling case for this Court's review. It does not demonstrate a conflict with decisions of this Court, Circuit Courts of Appeals, or highest courts in sister states. This Court's jurisdictional and prudential requirements militate against a grant of certiorari in this case. Further, Petitioners did not adequately present the issue to the trial court and to the Supreme Court of Arkansas. Under United States Supreme Court Rules and precedent, issues to be reviewed by certiorari must be presented with "fair precision and in due time." Petitioners' claim was not thus preserved. The writ should be denied.

I.

THE DECISION OF THE SUPREME COURT OF ARKANSAS IS CONSISTENT WITH DECISIONS OF THIS COURT, CIRCUIT COURTS OF APPEALS, AND SISTER STATES.

Petitioners claim that the decision of the Arkansas Supreme Court creates a conflict with decisions of this Court, the Circuit Courts of Appeals, and courts of last resort in sister states. *See* Petition for Writ of Certiorari (hereinafter, "Petitioners' Brief"), at 17-26.

A. THE SUPREME COURT OF ARKANSAS' DECISION IN *BNL EQUITY* DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

The Supreme Court of Arkansas' decision does not conflict with the decisions of this Court. Specifically, the opinion at issue here is completely consistent with both *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) and *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982).

Eisen was a class action brought by odd-lot securities traders against brokerage firms and a stock exchange for violation of the securities and antitrust laws. This Court reversed the Circuit Court and held that the plaintiffs' claims could proceed as a class action. The *Eisen* decision laid out the applicable rule for district courts' consideration of class actions under Rule 23:

> We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained.

Id. at 177-78. The Court went on to summarize:

> Additionally, we might note that a preliminary determination of the merits may result in

> substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials.

Id. at 178.

Falcon, on the other hand, was a class action brought by an employee under Title VII. The district court in that case did not hold an evidentiary hearing before certifying the class. *See Falcon* at 152. This Court stated:

> Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.

Id. at 160. Thus, the "rigorous analysis" petitioners contend is mandated by this Court can be anything from looking at the face of the pleadings to a full-blown evidentiary hearing, but it must stop short of examining the merits of the case. *See Eisen* at 177.

Petitioners' claim that the Arkansas Supreme Court interpreted *Falcon* too narrowly is incorrect on the face of the opinion itself. This Court's holding in *Falcon* was ***specifically limited*** to Title VII class actions. *Falcon* at 161. *Falcon*'s "rigorous analysis" language was a direct reaction to the Fifth Circuit's "across-the-board" approach to class certification first announced in *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1124 (5th Cir. 1969). Under the "across-the-board" approach, a Title VII plaintiff could

challenge every employment practice of a particular employer, even though that particular employee was not harmed by each and every one of those practices. *Falcon* rejected that approach, holding that Title VII plaintiffs are subject to the strictures of Federal Rule 23, just like any other private plaintiff.

Contrary to petitioners' assertions, the Supreme Court of Arkansas did not expressly reject the "rigorous analysis" approach in its decision in *BNL Equity*. The essence of the state court's holding is that the case cannot be tried at the class certification stage. While the Supreme Court of Arkansas has expressly prohibited trial courts from delving into the merits of the case at the class certification stage, nothing in this holding (or in the holdings of any of the cases decided on this point in recent years) prevents Arkansas trial courts from conducting a "rigorous analysis" of Rule 23 issues; the trial court in this case did in fact conduct such a "rigorous analysis." *See* Part I.C, *infra*. The trial court and appellate court's decisions unquestionably provided petitioners the due process protections guaranteed by the United States Constitution.

Moreover, the other cases relied upon by petitioners, *Ortiz* and *Amchem*, are class action *settlement* suits. Respondents concede that a more rigorous analysis is necessary for settlement classes because substantive rights of class members are directly implicated by the courts' decisions. However, a settlement class is inherently distinct from the initial certification of a class.

In *Amchem* and *Ortiz*, the parties agreed upon a class definition and a settlement before formally initiating litigation. According to the Eighth Circuit,

> The difficulty inherent in such a situation is that a district court "lack[s] the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold."
>
> * * *
>
> The difficulties associated with settlements like those in Amchem and Ortiz — the possibility of "collusion between class counsel and the defendant . . . [and] the need for additional protections when the settlement is not negotiated by a court designated class representative," . . . — are therefore not present here.

Petrovic v. Amoco Oil Co., 200 F.3d 1140 (8th Cir. 1999) (citations omitted). The process and protections necessary in *Amchem* and *Ortiz* were fundamentally different from the initial class certification process in this case. Under Arkansas Rule of Civil Procedure 23, the trial court retains jurisdiction to adjust, modify, or decertify the class at any time, thus avoiding the problems addressed in *Amchem* and *Ortiz*. Therefore, those cases are inapposite to the situation before this Court.

B. THE SUPREME COURT OF ARKANSAS' DECISION IN *BNL EQUITY* DOES NOT CONFLICT WITH DECISIONS OF THE CIRCUIT COURTS OF APPEALS.

The Circuit Courts of Appeals cases cited by petitioners do not compel a grant of certiorari in this case. Petitioners principally rely on three cases from the Fifth, Sixth, and District of Columbia Circuits to support their argument that

Arkansas' class certification approach is improper. *See, e.g.*, *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998); *Hartman v. Duffey*, 19 F.3d 1459 (D.C. Cir. 1994). Those three cases are clearly distinguishable in several ways.

The three cases cited by petitioner are federal court cases construing Federal Rule of Civil Procedure 23. As discussed above, there are inherent distinctions between the Federal Rules of Civil Procedure and the Arkansas Rules of Civil Procedure, even though the Supreme Court of Arkansas has stated that construction of Arkansas Rule 23 should be guided by federal precedent. Nonetheless, the Supreme Court of Arkansas is free at any time to interpret its own rule as it desires, so long as that construction is consistent with the U.S. Constitution. Moreover, the Supreme Court of Arkansas is free to apply federal precedent as it sees fit to construe its own rule. This is especially true when the federal precedent is ambiguous, as it is here.

The Fifth Circuit case cited by petitioners was a multistate tobacco suit. *See Castano*, 84 F.3d 734. A key point in the Fifth Circuit's decision to reverse class certification was that variations in state law could affect the predominance requirement of Rule 23. The Fifth Circuit reversed, at least in part, because "the district court's consideration of state law variations was inadequate .... Nothing in the record demonstrates that the court critically analyzed how variations in state law would affect predominance." *Castano* at 743.

To the contrary, the Arkansas Supreme Court faced none of these considerations in the *BNL Equity* case. The issue in *BNL Equity* is straightforward — whether or not the

petitioners violated Ark. Code Ann. § 23-42-106(a)(1). It is purely an issue of Arkansas law. As such, the primary consideration underlying the Fifth Circuit's decision in *Castano* is not present in this case.

The petitioners also cite the Sixth Circuit case of *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998), which was a class action brought under ERISA. Again, the *Sprague* case construed Rule 23 of the Federal Rules of Civil Procedure rather than a comparative state provision. The decision turned on unique provisions of ERISA that affected Rule 23 considerations. Thus, the concerns facing the Sixth Circuit in *Sprague* are not applicable here.

The petitioners' reliance on *Hartman v. Duffey*, 19 F.3d 1459 (D.C. Cir. 1994), is also misplaced. *Hartman* involved a gender discrimination class action brought by employees of the United States Information Agency (USIA) against the agency. The court discussed the necessity for a rigorous analysis in the employment discrimination context because of the particular distinctions inherent in individual jobs. Specifically, the D.C. Circuit stated:

> We emphasize that there is no requirement in this circuit that a trial court conduct an evidentiary hearing or make specific factual findings on the issue of class certification in every case. *But in this instance* the paucity of the record on the question of the appropriate class certification effectively precludes us from performing our reviewing task.

Id. at 1473. Thus, the D.C. Circuit case cited by petitioners reemphasizes the point that the level of inquiry in class

certification analysis is case-specific and varies according to the facts.

The Supreme Court of Arkansas' approach, as outlined in *BNL Equity*, does not conflict with the approach used by various Circuit Courts of Appeals because each case relied upon by the petitioners can be easily distinguished on its facts. Moreover, the *BNL Equity* trial and appellate courts reviewed the class certification motion with the proper scrutiny as outlined by Arkansas precedent. Indeed, the trial court's opinion thoroughly analyzed the relevant authorities and applied the law therein enunciated to the facts before it in *BNL Equity*, concluding that class certification was appropriate. *See* Appendix to Petitioners' Brief at 19a-42a. The petition for certiorari should be denied.

C. THE SUPREME COURT OF ARKANSAS' DECISION IN *BNL EQUITY* DOES NOT CONFLICT WITH THE APPROACH OF SISTER STATES.

Finally, petitioners argue that the Supreme Court of Arkansas' approach varies from that of sister states. To support this assertion, petitioners cite cases from Texas, South Carolina, and (in a footnote) Alabama and New Jersey. In reality, the cases cited by petitioners do not reflect that other states have a different procedure than Arkansas. Instead, these cases indicate that petitioners are elevating form over substance. While some other states have embraced the "rigorous analysis" language of *Falcon*, the substance of those states' actual procedure for certifying class actions is virtually indistinguishable from Arkansas' procedure.

The Alabama case cited by petitioners is a classic example. In *Ex parte Mayflower National Life Ins. Co. v. Heard*, 2000 WL 548211 (Ala. May 5, 2000), the Alabama Supreme Court elaborated on its definition of "rigorous analysis:"

> The United States Supreme Court, applying Rule 23 of the Federal Rules of Civil Procedure, has said that, before issuing any class certification order, a trial court must be "satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *The essence of this holding, it appears to us, is that every class certification must, at a minimum, identify each of the four elements of Rule 23(a) and explain in detail how the proponents of the class have met their burden of proving those elements.*

Id. at *2 (quoting from *Ex parte Equity National Life Ins. Co.*, 715 So. 2d 192 (Ala. 1997)) (quotations omitted) (emphasis added).

Under this definition of "rigorous analysis," it is clear that the Pulaski County Circuit Court's class certification order satisfies the requirements. The trial court's certification order analyzed each of the requirements of Arkansas Rule of Civil Procedure 23(a) and then discussed in detail the requirements of Rule 23(b). *See* Appendix to Petitioners' Brief at 24a-34a (discussing language of Rule 23(a) and (b)) and 34a-41a (applying the law to the particular facts of this case). Thus, even assuming that petitioners' characterization of the Arkansas Supreme Court's holdings on this issue are correct, petitioners are still attempting to elevate form over substance. The trial court *did* employ a "rigorous analysis"

in this case even though it was not specifically required to do so under Arkansas law.

In the New Jersey case cited by petitioners, the court reversed a certification order "because of the trial court's too brief analysis . . . ." *Carroll v. Cellco Partnership*, 713 A.2d 509, 514 (N.J. Super. Ct. App. Div. 1998). The *Carroll* case involved class-wide issues affected by variance in state law. As in the Fifth Circuit's *Castano* decision, the trial court failed adequately to consider how variance in state law would affect the predominance requirement of Rule 23. Thus, the New Jersey court's decision was based on the particular facts of the case. It also does not add to any supposed "conflict" between states because it is not a decision of the highest court in New Jersey.[1]

The Texas cases cited by petitioners liberally cite *Castano* while restating the *Falcon* rule of "rigorous analysis." Importantly, the main case cited by petitioners, *Southwestern Refining Co., Inc. v. Bernal*, 2000 WL 566745 (Tex. 2000) states very clearly that federal case law on Rule 23 is only "persuasive authority" in the state court context. *Southwestern Refining Co. v. Bernal*, 2000 WL 566745 at *7; *see also Ford Motor Co. v. Sheldon*, 2000 WL 566766, at *6. Since the same type of approach is used in Arkansas,[2]

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1. The New Jersey case is not a decision of the highest court of that state; rather, it is a decision from the Superior Court, Appellate Division. *See Carroll v. Cellco Partnership*, 713 A.2d 509 (N.J. Super. Ct. App. Div. 1998).

2. *See Fraley v. Williams Ford Tractor Co.*, 339 Ark. 322, 336, 5 S.W.3d 423, 432 (1999) ("We have said that we will interpret Ark. R. Civ. P. in the same manner the federal courts interpret the comparable Fed. R. Civ. P. 23.").

a careful analysis shows there is no true conflict between the Supreme Court of Arkansas's Rule 23 precedent and holdings of this Court, the Circuit Courts of Appeals, or highest courts of sister states.

II.

THIS COURT SHOULD NOT GRANT CERTIORARI BECAUSE OF WELL-SETTLED JURISDICTIONAL AND PRUDENTIAL PRINCIPLES.

The jurisdiction of this Court to review decisions of state courts has been historically limited by constitutional and prudential concerns. Review of state court decisions by this Court is antithetical to the federal system of government contemplated by the United States Constitution and reinforced by decisions of this Court. Petitioners have asserted no compelling grounds on which this Court has jurisdiction to issue a writ of certiorari. Under the doctrines discussed below, this Court should deny the petition for writ of certiorari.

A. THE ARKANSAS SUPREME COURT'S DECISION IS BASED ON AN INDEPENDENT AND ADEQUATE STATE GROUND.

In *Adams v. Robertson*, 520 U.S. 83 (1997), this Court clearly stated the principles governing certiorari in a situation similar to the one at bar:

> Here, the Alabama Supreme Court has an undeniable interest in having the opportunity to determine in the first instance whether its existing rules governing class-action settlements satisfy

> the requirements of due process, and whether to exercise its power to amend those rules to avoid potential constitutional challenges.

Adams v. Robertson, 520 U.S. at 90. The Court went on to state:

> Here, even if the state court's construction of its class-action rules would not obviate the due process challenge, it would undoubtedly aid our understanding of those rules as a predicate to our assessment of their constitutional adequacy. And not incidentally, the parties would enjoy the opportunity to test and refine their positions before reaching this Court.

Id. at 91.

This well-established principle of deference to states on questions of purely state law is embodied in the constitutional principle of "independent and adequate state grounds." Under this doctrine,

> this Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." We in fact lack jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory.

See Lambrix v. Singletary, 520 U.S. 518, 522-23 (1997) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)) (citations omitted).

The test for adequate and independent state grounds is most eloquently stated in *Michigan v. Long*:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Michigan v. Long, 463 U.S. 1032 (1983).

Here, it is evident that the state court decision of which petitioners seek review is supported by "bona fide separate, adequate, and independent grounds." The decision is based squarely on Supreme Court of Arkansas case precedent and

the language of Arkansas Rule of Civil Procedure 23. While it is true that Arkansas courts rely on federal precedent in construing Arkansas Rule of Civil Procedure 23, *see Fraley v. Williams Ford Tractor & Equip. Co.*, 339 Ark. 322, 336, 5 S.W.3d 423, 432 (1999), it does not automatically follow that a federal question is present in the case. The Supreme Court of Arkansas, in its most recent pronouncement on the issue, stated clearly:

> We have said that we will interpret Ark. R. Civ. P. 23 *in the same manner* the federal courts interpret the comparable Fed. R. Civ. P. 23.

Fraley v. Williams Ford Tractor & Equip. Co., 339 Ark. at 336, 5 S.W.3d at 432 (emphasis added). Thus, the Supreme Court of Arkansas is relying on federal precedent for guidance rather than as controlling law, just as the independent and adequate state grounds test envisions.

The Supreme Court of Arkansas is free to construe its own rule of civil procedure in any way it chooses, as long as that construction is constitutional. The Supreme Court of Arkansas has promulgated a long line of opinions on the proper scrutiny courts should give class certification decisions. The most recent of these cases were cited in the Supreme Court of Arkansas's opinion in this case, where the justices explicitly chastised BNL Equity:

> The appellants, however, are plowing old ground in raising an issue that has clearly been decided by this court. Most recently, we said:
>
> > We have held that neither the trial court nor the appellate court may delve into

> the merits of the underlying claim in determining whether the elements of Rule 23 have been satisfied. In that regard a trial court may not consider whether the plaintiffs will ultimately prevail, or even whether they have a cause of action. Thus, the propriety of a class action is "basically a procedural question."

BNL Equity, 10 S.W.3d at 841 (quoting *Fraley v. Williams Ford Tractor & Equip. Co.*, 339 Ark. at 335, 5 S.W.3d at 431 (1999)).

B. ARKANSAS RULE OF CIVIL PROCEDURE 23 IS A PROCEDURAL RULE THAT DOES NOT IMPLICATE SUBSTANTIVE RIGHTS.

According to prevailing law, "Supreme Court jurisdiction to protect federal rights requires distinction between state procedural grounds and state substantive grounds in an assessment of independence and adequacy." *See* Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE, § 4021 (2d ed. 1996 and Supp. 2000). The Supreme Court of Arkansas has held that the construction of Rule 23 is a procedural issue which does not implicate substantive rights. *See Fraley v. Williams Ford Tractor & Equip. Co.*, 339 Ark. at 335, 5 S.W.3d at 431 (1999). In *Phillps Petroleum v. Shutts*, this Court discussed the requirements of the Due Process Clause in the context of class actions: "notice, an opportunity to be heard, a right to opt out, and adequate representation." *See Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985). While the *Shutts* case discussed procedural due process requirements necessary to

bind absent class members, its holding is broad enough to include due process requirements for class-action defendants as well.

Petitioners had notice of the class certification hearing, and they actually appeared and presented their case both at the trial and appellate court levels. Petitioners make no claim that the trial or appellate courts denied them an opportunity to defend themselves against respondents' claims. Thus, procedural due process was served by the Arkansas procedure, and petitioners' constitutional rights are not implicated.

C. A GRANT OF CERTIORARI IN THIS CASE WOULD VIOLATE FUNDAMENTAL PRINCIPLES OF THE CONSTITUTIONAL FEDERAL SYSTEM.

Even though Arkansas Rule of Civil Procedure 23 is to be construed using federal precedent, principles of federalism demand that Arkansas be given leeway to promulgate its own rules and construe these rules as its courts deem proper. States are and should be free to set up their own procedural requirements and to have control over their own court systems. Arkansas and other states may use Rule 23 of the Federal Rules of Civil Procedure precedent as persuasive authority, but federal authority should not be controlling, especially when the rule at issue is a state procedural rule. According to Wright, Miller & Cooper:

> State courts have their own strong interests in applying state procedure to litigation that involves federal questions. At a minimum, courts and counsel are familiar with the local procedure, and often are better able to apply it correctly than

> federal procedure. Even if litigators and courts were equally well versed in both state and federal procedure, moreover, efficiency is promoted and mistake-inducing confusion is avoided by applying a uniform and integrated set of rules to litigation in a single case. State courts, further, may have developed a procedure that is either intrinsically better than federal procedure, or that is better adapted to the institutional setting of the state courts. The state interest, in short, is in following procedure that is familiar, uniform, and good. The Supreme Court as well has an interest in leaving state courts free to follow their own procedure.

Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE, § 4021.

In this case, respondents submit that the proper prudential path for this Court to take is to deny petitioners' request for a writ of certiorari to the Supreme Court of Arkansas. The state trial and appellate court decisions were based on independent and adequate state grounds, proper procedure was followed, and the federal system compels deference to the Arkansas appellate court's decision in this case. The writ should be denied.

III.

PETITIONERS DID NOT PROPERLY RAISE OR PRESERVE THE QUESTION PRESENTED BY THEIR PETITION.

Questions to be reviewed by this Court must be raised and presented to the court rendering the judgment below. In *Adams v. Robertson*, 520 U.S. 83 (1997), this Court stated:

> With "very rare exceptions" . . . we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Id. at 86 (citations omitted) (citing *Heath v. Alabama*, 474 U.S. 82 (1985)). In addition, it is well-settled that "[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented." *Id.* (citing *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987)).

In *Adams*, this Court granted certiorari to decide whether Alabama's state class action rules violated federal due process standards. Later, this Court dismissed the writ, holding that certiorari was improvidently granted because the issue was not properly raised in the courts below. The Court reached this decision even though the petitioners in *Adams* had addressed the federal question in their briefs at the trial court and state supreme court levels. *See id.* at 87-89.

The Supreme Court of Arkansas' opinion in this case is resoundingly silent concerning petitioners' due process claim. Thus, petitioners must overcome the presumption that the issue was not presented to the Arkansas Supreme Court. *See Adams*, *supra*, 520 U.S. at 86-87. Petitioners undeniably have failed to overcome this presumption and are barred from raising the due process claim before this Court.

Petitioners assert that the claim was properly raised before the trial court and the Arkansas Supreme Court.

See Petitioners' Brief, at 6-7. Petitioners, however, are under an obligation to do more than merely raise the issue. As discussed in the *Adams* case, the petitioners have the burden of proving they presented the federal claim with "fair precision and in due time." *Adams*, 520 U.S. at 88. It is axiomatic that this Court should not "disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Id.* at 90.

Supreme Court Rule 14(g)(i) states that a petition for writ of certiorari should contain, among other materials,

> (g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:
>
> > (i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to

> review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

Sup. Ct. R. 14(g)(i).

Petitioners have not demonstrated that they adequately presented their due process argument to either the trial court or the Supreme Court of Arkansas. The requirements of Rule 14(g)(i) have not been followed with sufficient specificity because the pages of the record cited by petitioners are voluminous. This Court, however, does not have the actual pages reproduced or a fair and accurate summary of those pages. Moreover, the Arkansas courts were never asked or given the proper opportunity to contour their interpretation of Arkansas Rule of Civil Procedure 23 in a due process context. For this reason, the writ should be denied.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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